

ALRC 69

EQUALITY BEFORE THE LAW: JUSTICE FOR WOMEN

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This Report reflects the law as at 1 April 1994

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Commission Reference: ALRC 69

The Law Reform Commission was established by the *Law Reform Commission Act 1973* section 6 to review, modernise and simplify the law. It started operation in 1975. The office of the Commission is at 133 Castlereagh Street, Sydney, NSW, Australia.

Terms of reference

COMMONWEALTH OF AUSTRALIA

Law Reform Commission Act 1973

I, MICHAEL JOHN DUFFY, Attorney-General of Australia, HAVING REGARD TO:

- (a) the principle of equality before the law;
- (b) Australia's obligations under international law, including under
 - articles 2 and 26 of the International Covenant on Civil and Political Rights to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in that Covenant and to the equal protection of the law;
 - and
 - the Convention on the Elimination of All Forms of Discrimination Against Women

in pursuance of section 6 of the *Law Reform Commission Act 1973*, HEREBY REFER to the Law Reform Commission the following matters:

- (a) whether any changes should be made to any laws made by, or by the authority of, the Parliament of the Commonwealth of Australia, including laws of the Territories so made, and any other laws, including laws of the Territories, that the Parliament has power to amend or repeal;
- (b) whether any additional laws should be made within the legislative power of the Commonwealth to effect change to the unwritten laws of Australia;
- (c) whether any changes should be made to the ways these laws are applied in courts and tribunals exercising Commonwealth jurisdiction;
- (d) the appropriate legislative approach to reforming that law; and
- (e) any non-legislative approach

so as to remove any unjustifiable discriminatory effects of those laws on or of their application to women with a view to ensuring their full equality before the law.

IN PERFORMING its functions in relation to the Reference, the Commission shall:

- (i) consult widely amongst the Australian community and with relevant bodies, and particularly with the Human Rights and Equal Opportunity Commission, the Affirmative Action Agency and the Sex Discrimination Commissioner;
- (ii) consider and report on Australian community attitudes on difficulties associated with gender bias as it relates to women;
- (iii) in recognition of work already undertaken, have regard to all relevant reports, including:
 - the National Strategy on Violence Against Women prepared by the National Committee on Violence Against Women;
 - the Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act 1975*;

- the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on its Inquiry into Equal Opportunity and Equal Status for Women in Australia, particularly as it relates to the *Sex Discrimination Act 1984*;
- the Australian Law Reform Commission's Report No 57 on *Multiculturalism and the Law*;
- the Australian Law Reform Commission's Report No 39 on *Matrimonial Property*; and
- the Review of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* by the Affirmative Action Agency; and

(iv) consider and report on the relevant law of any other country.

THE COMMISSION IS REQUIRED to make an interim report not later than 31 December 1993 and to make the final report not later than 30 June 1994.

Dated 8 February 1993

Michael Duffy

Attorney-General

Participants

The Commission

The Division of the Commission constituted under the *Law Reform Commission Act 1973* for the purpose of this reference comprises the following members of the Commission

President

Justice Elizabeth Evatt, AO, LLB (Syd), LLM (Harv) (to November 1993)
Alan Rose, AO, BA, LLB (Hons) (Qld), LLM (LSE) (from June 1994)

Deputy President

Sue Tongue, BA, LLB (Hons) (ANU) (Deputy President) (from September 1993)

Commissioners

Professor Rebecca Bailey-Harris, BCL, MA (Oxon)
Professor Hilary Charlesworth, BA (Hons), LLB (Hons) (Melb), SJD (Harv) (from October 1993)
Justice Elizabeth Evatt, AO, LLB (Syd), LLM (Harv) (from November 1993)
Associate Professor Regina Graycar, LLB (Hons) (Adel), LLM (Harv) (from October 1993)
Associate Professor Jenny Morgan, BA (Hons) (Syd), LLB (NSW), LLM (Yale) (from October 1993)
Christopher Sidoti, BA, LLB (Syd)

Consultant to the Commission

The Hon Justice Margaret Beazley, LLB (Hons) (Syd), QC

Project Managers

Russell Agnew, BEc (Hons) LLB (Macq) (from May 1993 until November 1993)
Dr Rowena Daw, BA, LLB (Adel), D Phil (Oxon) (from November 1993)

Law Reform Officers

Peter Barley, LLB (Hons) (UTS) (from 9 June 1994)
Louise Gell, BA, LLB (ANU) (from September 1993)
Anne Sutherland-Kelly, BA (Hons), LLB (Melb) (from June 1993)
Jane Wangmann, BA, LLB (NSW) (from June 1993)
Dr Ania Wilczynski, BA, LLB (NSW), MPhil (Cantab), PhD (Cantab) (from December 1993 until 7 June 1994)

Research Assistant

Ursula Armstrong, BA, LLB (NSW) (from October 1993)

Project Assistants

Jan Brennan
Bridie Healey
Rhonda Kasalo

Library

Reanne Davis, BA, App Sc (info) (UTS)
Joanna Longley, BA (Lib) (CCAIE)

Anna Pedden, BEc (Macq), Grad Dip App Sc (info) (UTS)

Typesetting

Anna Hayduk

Special consultant

Mary Crock, BA (Hons) (Melb), LLB (Hons) (Melb), PhD (Melb)¹

¹ Mary Crock was a special consultant on Chapter 11: Violence and refugee women.

Abbreviations

AAA	Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)
ABS	Australian Bureau of Statistics
AGPS	Australian Government Publishing Service
AIRC	Australian Industrial Relations Commission
ALRC	Australian Law Reform Commission
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
DDA	Disability Discrimination Act 1992 (Cth)
Family Law Act	Family Law Act 1975 (Cth)
<i>Half Way to Equal</i>	House of Representatives Standing Committee on Legal and Constitutional Affairs <i>Half way to equal: report of the inquiry into equal opportunity and equal status for women in Australia</i> AGPS Canberra 1992
HREOC	Human Rights and Equal Opportunity Commission
HREOCA	<i>Human Rights and Equal Opportunity Commission Act 1986</i> (Cth)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	Illawarra Legal Centre
ILO	International Labor Organisation
IRB	Immigration and Refugee Board (Canada)
Iredale Report	R Iredale, J Innes & S Castles <i>Serial sponsorship: immigration policy and human rights</i> University of Wollongong 1992
NCVAW	National Committee on Violence Against Women
NDVEP	National Domestic Violence Education Program
NSWLRC	New South Wales Law Reform Commission
OSW	Office of the Status of Women
QLRC	Queensland Law Reform Commission
RDA	<i>Racial Discrimination Act 1975</i> (Cth)
RDC	Race Discrimination Commissioner
RRT	Refugee Review Tribunal
SDA	<i>Sex Discrimination Act 1984</i> (Cth)
SDC	Sex Discrimination Commissioner
STAW	Stopping Violence Against Women Community Education Program
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
VLRC	Victorian Law Reform Commission
Vienna Declaration	Vienna Declaration and Program of Action, World Conference on Human Rights 1993

Summary of recommendations

3. Strengthening the Sex Discrimination Act

Recommendation 3.1

- a) The SDA should contain a general prohibition of discrimination in accordance with CEDAW article 1.
- b) The reference to human rights and fundamental freedoms in the general prohibition of discrimination should relate to the rights and freedoms articulated in CEDAW, the ICCPR and the ICECSR. These international conventions provide an expanded reference point for the rights and freedoms to be protected by a general prohibition.

Recommendation 3.2

- a) A simpler definition of indirect discrimination should be included in the SDA, along the lines of the Discrimination Act 1991 (ACT) s 8(1)(b). The matters listed in Discrimination Act 1991 (ACT) s 8(3), which are to be considered in determining reasonableness in the circumstances, should also be included.
- b) The amendments should make it clear that the respondent must prove, on the balance of probabilities, that the condition or requirement imposed or proposed to be imposed is reasonable in the circumstances.

Recommendation 3.3

- a) The SDA should be amended along similar lines to the Discrimination Act 1991 (ACT) s 73(2).¹ Such a provision in the SDA could read as follows:

The Commissioner may, of her own motion, investigate conduct that appears to be unlawful under Part II of the SDA.

- b) The SDC should not be required to seek the consent of HREOC to conduct an investigation of her own motion.
- c) In exercising this power the SDC should have all the powers of discovery that are currently available under the SDA to deal with a complaint.

Recommendation 3.4

- a) The SDA should be amended to contain provisions modelled on the Disability Discrimination Act 1992 (Cth) s 31 to provide the Minister with power to formulate standards to further the objectives of the SDA. Such standards should be laid before both Houses of Parliament within 15 days of their formulation. The standards should be able to be amended or disallowed by each House of Parliament as is provided for in the DDA.
- b) It should be unlawful to contravene a standard under the SDA.
- c) In devising standards the Minister should be required to consult with the SDC and relevant persons, groups or organisations.
- d) The SDC should be given power to make reports to the Minister on matters relating to the development of standards.

Recommendation 3.5

- a) As a result of an investigation on her own initiative, in which the organisation investigated failed to implement the recommendations made by the SDC to improve the practices of the organisation to eliminate discrimination, the SDC may make a report to the Attorney-General.

- b) The report should detail the conduct of the investigation, the findings of the investigation and the recommendations made by the SDC as a result of the investigation. The report should also contain the organisation's reasons for failing to implement the recommendations if reasons have been given.
- c) The Attorney-General should be required to have a copy of the report laid before both Houses of Parliament within 15 sitting days.
- d) The report may contain recommendations for the development of standards under the SDA.

Recommendation 3.6

The SDA should be amended to prohibit discrimination against an individual on the basis of the identity of a spouse or other person in a relationship with that individual. The prohibition should extend to all types of relationships, such as familial and same sex. It should not be limited to heterosexual, marital or de facto, relationships.

Recommendation 3.7

- a) SDA s 33 should be amended to provide for the full implementation of CEDAW article 4(1), as follows

Temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined by Division 1 or 2, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

- b) SDA s 32 should be amended to provide for the full implementation of CEDAW article 4(2), as follows

The provision of services the nature of which is such that they can only be provided to members of one sex shall not be considered discrimination as defined by Division 1 or 2.

Recommendation 3.8

The SDC should have power to make a declaration that a measure is a special measure for the purpose of the SDA. Where the SDC has declared that a measure is a special measure a person challenging the measure under the SDA should bear the onus of proving that it is not. A measure may still be held to be a special measure by HREOC and the Federal Court even if the SDC has not made a declaration in relation to it.

Recommendation 3.9

- a) The SDA should be amended to provide that, where a complainant formulates her complaint on the basis of different grounds of discrimination covered by the separate federal legislation, then HREOC or the court must consider joining the complaints under the relevant pieces of legislation. In so doing HREOC or the court must consider the interrelation of the complaints and accord an appropriate remedy if it is substantiated.

- b) The provision could read as follows:

If it appears to the tribunal that the facts before it support the conclusion that the complainant has, or may have, suffered discrimination on grounds other than those specified in the SDA, and that those grounds are covered by the Racial Discrimination Act 1975 (Cth) and/or the Disability Discrimination Act 1992 (Cth), and the complainant formulates the complaint as an integration of those grounds, then the Commission may consider and determine the complaint and may make orders as if the complaint had been made under each piece of legislation and joined together.

- c) A similar provision should be inserted in the Racial Discrimination Act 1975 (Cth) and the Disability Discrimination Act 1992 (Cth).

Recommendation 3.10

The SDA should be amended to repeal s 13 which exempts the instrumentalities of States and Territories.

Recommendation 3.11

The exemption contained in SDA s 38 for educational institutions established for religious purposes should be removed. At the very least the exemption should be removed in relation to discrimination on the ground of sex and pregnancy. The exemption for discrimination on the ground of marital status, if it is to be retained, should be amended to require a test of reasonableness.

Recommendation 3.12

The exemption for the Social Security Act 1991 (Cth) needs to be examined thoroughly. The Commission recommends a further reference on whether the Social Security Act 1991 (Cth) should continue to be exempt from the provisions of the Sex Discrimination Act 1984 (Cth) and whether additional special measures would be required if the exemption was repealed.

Recommendation 3.13

The exemptions in the SDA for voluntary bodies and sport should be repealed as recommended by the Sex Discrimination Commissioner Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984

Recommendation 3.14

The SDA should provide, along the lines of the Disability Discrimination Act 1992 (Cth) s 69(2), that HREOC should give appropriate assistance to a person who wishes to make a complaint under the SDA in the formulation of the complaint and in reducing the complaint to writing.

Recommendation 3.15

The SDA should be amended to require the SDC to publish, or otherwise make available, a public register of settlements reached in conciliation. This could be done through a public report or through HREOC's annual report to parliament. No names or identifying information concerning the parties should be included in the public record.

Recommendation 3.16

a) The SDA should provide that the SDC may refer a matter directly to hearing where the respondent is a repeat discriminator. In considering whether to exercise this discretion to refer the matter to a hearing, the SDC must take into account:

- i) the wishes of the complainant, and
- ii) the nature and frequency of the repeat respondents violations of the SDA.

b) If a matter is referred to hearing and the complainant is unable to afford the costs involved then HREOC should recommend to the Minister under 83(1) that assistance be provided to the complainant for expenses incurred in connection with the hearing.

Recommendation 3.17

In making awards of damages for discrimination the HREOC and the Federal Court should have regard to awards made at common law or under statute as compensation for loss, injury or damage of a comparable nature (and shall specify these factors in reasons).

4. Access to Justice: Legal Aid

Recommendation 4.1

LACs should thoroughly evaluate the gender implications of the ADR processes and adopt best practice guidelines similar to those in the Family Court.

Recommendation 4.2

Legal aid guidelines in all jurisdictions should specifically state that culture and language difficulties affecting an applicant's capacity to cope with the legal system should be considered in determining priority for legal aid. Women's legal services should be funded in consultation with their local communities to target the specific needs of women of non-English speaking background.

Recommendation 4.3

The Commonwealth should take a more directive role in determining legal aid priorities in the interests of women. In particular it should ensure that the needs of applicants in family and civil matters are adequately met.

Recommendation 4.4.

The Commission recommends that the Attorney-General's Department undertake a detailed examination of legal aid legislation and guidelines to determine the most appropriate way to achieve this change in priorities. The Attorney-General's Department should determine the changes required to ensure that applicants in criminal, family and civil matters are accorded a minimum level of legal protection and assistance.

5. Access to Justice: Specialist Women's Legal Services

Recommendation 5.1

As a part of the National Women's Justice Program funding should be provided by the Commonwealth for an additional women's legal service in each State and Territory. Funding should include a separate component for programs to assist women of non-English speaking background and women in rural areas.

Recommendation 5.2

The NWJP should fund the establishment of legal services for Aboriginal and Torres Strait Islander women in areas where consultation with the local indigenous women indicates a demand for such a service. In determining the location of the services, the following matters are to be taken into account:

- The services are where possible to be staffed and managed by Aboriginal and Torres Strait Islander women. The type of legal service provided should be determined by the women of the communities to be served.
- The services are to be targeted at regions of greatest need, having particular regard to remoteness and existing services in the region.
- The existence of community networks which are demanding such a service and which will use and support the service.

6. Access to justice: Court Support Schemes

Recommendation 6.1

The National Women's Justice Program should provide funds to expand existing court support schemes and to establish new schemes.

The various legal professional bodies should take an active role in these schemes through encouraging members to participate on a pro bono basis.

7. Access to justice: Court facilities and processes

Recommendation 7.1

The Federal Police and State and Territory police forces should adopt clear policy guidelines requiring the use of interpreter services in cases of sexual assault or domestic violence in interviews with suspected perpetrators and women who require interpreters. Police standing orders should be amended to give effect to this requirement.

The Commonwealth, through the Standing Committee of Attorneys-General, should encourage the States and Territories to enact legislation to protect the right of women to an interpreter throughout the investigation process where they have been the target of sexual assault or domestic violence.

Recommendation 7.2

The Commission affirms its recommendations on interpreters in its report on Multiculturalism and the law.

Recommendation 7.3

In matters involving domestic violence a women should have a statutory right to appropriate interpreting services when giving evidence and to understand the whole proceedings. The cost of the interpreting service should be borne by the court.

Recommendation 7.4

The Family Court should include in its policy guidelines on interpreters a requirement that its clients be informed of their right to an interpreter and the availability of free interpreting services provided by the court.

Recommendation 7.5

The Commission recommends more funding and training of interpreters to a competent and accredited level. All interpreters should receive gender awareness training and interpreters working within the legal system should be accredited as specialised legal interpreters.

Recommendation 7.6

All courts exercising federal jurisdiction should provide access to child-care facilities, either on site or through arrangement with a local child-care centre. Facilities should include full-time, affordable child-minding services, play areas and suitable toilet and changing facilities. Capital works funds should be provided for capital works to address existing deficiencies on the basis of need. When new courts are built or old ones refurbished, child-care facilities should be included.

Recommendation 7.7

Adequate separate waiting areas and conference areas should be provided to ensure that women are not placed in fear by close proximity with the alleged perpetrator of violence and that they have adequate opportunity to discuss personal matters with their lawyer or support person in private.

Recommendation 7.8

The Commonwealth through the Standing Committee of Attorney's General should encourage States and Territories to ensure that statutory provisions

- permit the use of support persons in court proceedings
- provide for closing the court
- providing screens or close circuit television for witnesses

in all case in which witnesses may suffer emotional trauma or be intimidated or distressed or unable to give evidence by reason of the subject matter of the evidence, particularly in domestic violence and sexual assault cases

The support person should be of the witnesses' choice. This person should be allowed to sit in close proximity to the witness while she gives evidence.

9. Violence and family law

Recommendation 9.1

Family Law Act s 64(1)(bb)(va) should be amended to provide that in considering custody and access orders the court must take into account the need to protect the child from abuse, ill treatment or exposure or subjection to violence or other behaviour, in relation to the child or another person, which physically or psychologically harms the child.

Recommendations 9.2

Family Law Act s 64(1) should be amended to provide that, notwithstanding anything in that section, in making, varying or revoking an order of access by a party to a child, the court must consider whether that party has used or there is a risk that the party will use access as an occasion to expose the child, the other party or any other person to violence, threats, harassment or intimidation.

If the court determines that there has been violence or there is a risk of violence by the non-custodial parent during access visits or on handover, the court must suspend or revoke any existing access order, unless it contains arrangements which the court considers

- (i) are in the best interests of the child,
- (ii) are not unduly burdensome on the custodial parent and
- (iii) minimise the risk of violence.

Before making a further order for access or reinstating an order for access, the court must be satisfied that arrangements for handover and access visits of the child are in the child's best interests, not unduly burdensome on the custodial parent and minimise the risk of violence.

Recommendation 9.3

The Family Court or any court exercising Family Court jurisdiction under the Family Law Act, when making orders for custody and access must take into account the existence of protection orders made under State or Territory legislation so as to ensure that the protection of women and children is not compromised.

Recommendation 9.4

The Family Law Act should be amended to list the factors to be considered by the court in deciding whether to order separate representation. One of those factors should be in terms similar to section 64(1)(bb)(va), that is, whether the child has been or there is a risk that the child will be abused, ill-treated or exposed or subjected to violence or other behaviour which is psychologically harmful to the child.

Recommendations 9.5

Regulation 16 of the Family Law (Child Abduction Convention) Regulations should be amended to provide that in deciding whether there is a grave risk that the child's return would expose the child to physical or psychological harm or an intolerable situation regard may be had to the harmful effects on the child of past violence or of violence likely to occur in the future towards the abductor by the other parent if the child is returned.

The Commonwealth Contracting Authority should be requested to raise the problem of women fleeing with their children from violent spouses with the monitoring body of the Convention with a view to amending the Convention to make it clear that in deciding whether a child should be returned under subregulation (3) the Court must take into account the likelihood that the child will be exposed to violence or the effects of violence by one parent against the other.

The Regulations should provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has the care of the child.

Funds should be provided by the Commonwealth to the Commonwealth Contracting Authority to ensure that in appropriate cases either parent can take action for custody to be determined in the Family Court.

Recommendation 9.6

The Commission endorses its previous recommendations in its report on Matrimonial Property which states that a rule of equal sharing should be the starting point in distribution of property. Any formulation of circumstances in which the Court should depart from equality as a starting point should include a reference to the impact of violence on past contributions and on future needs.²

Recommendation 9.7

The Commission endorses its previous recommendation in its report on Multiculturalism and the law that the law relating to property disputes arising from de facto relationships should be uniform throughout Australia. This should be achieved through a referral of powers to the Commonwealth by the States.

The Commission further recommends that a uniform law should take account of the parties' future needs as well as past contributions.

Recommendation 9.8

Court counsellors, Registrars and specialist family lawyers should receive training in the dynamics of family violence, in particular in the disempowering effect on the target of the violence and the effect on the ability to negotiate or reach agreement.

The Family Court should improve procedures to ensure that whether counselling is voluntary or court-ordered, where violence has been a factor in the relationship, counsellors are informed of it before the first appointment.

Where there is a history of violence, the allocation of counsellors should take this into account and the most experienced counsellors should be allocated to the case.

Recommendations 9.9

The Family Law Act should provide that where the court is considering making an order that the parties attend counselling under s 14(2), 14(2A), 14(4), 14(5), 62(1) and 64(1AA), it shall take into account any allegations of violence or reluctance of a party to attend because of violence, or the need to ensure the protection of a party.

S 64(1B) should be amended to provide that in considering whether it is appropriate to make an order concerning the custody, guardianship or welfare of, or access to, a child, without requiring the parties to attend a conference, the court shall consider the circumstances relating to violence alleged against a party or found to have occurred.

Recommendation 9.10

Part IIIA of the Family Law Act should be amended to provide that mediation should not take place where violence has occurred or is occurring unless the woman has made an informed choice to be part of this process and enquiries have been made to establish whether violence has been a factor in the relationship which may affect the ability of the parties to negotiate successfully.

Recommendation 9.11

Sections 70C and 114 should be amended to define the scope of injunctions for personal protection from violence. The definition should include within the scope of injunctions orders for protection from harassment, intimidation, threats and stalking.

Recommendation 9.12

The Family Law Act should be amended to provide that a wilful breach of an order for personal protection under s 70D and s 114 is a criminal offence.

Recommendations 9.13

A 'best practice' model for law and procedure relating to protection orders should be developed by the Commonwealth through the National Women's Justice Program and in consultation with State and Territory agencies.

Training about the dynamics of violence against women in the home should be required for police, court officers, lawyers and members of the judiciary and magistracy when dealing with family law and violence matters.

The National Women's Justice Program should promote and coordinate data collection and research about violence against women in the home, including ongoing evaluation of the effectiveness of protection orders.

10. Violence against women and immigration law

Recommendation 10.1

Training about the nature and effects of domestic violence should be provided to assist decision makers where conflicting evidence about the nature and history of a relationship is presented following its breakdown.

Recommendation 10.2

The provisions for the grant of permanent residency to temporary entrants who are subjected to domestic violence should be extended to include cases where evidence of domestic violence is available from community and welfare workers, medical and legal practitioners and other suitable third parties.

Recommendation 10.3

The domestic violence provisions should be extended to include cases where there is evidence of violence or a real risk of violence by the sponsor against a child of the woman.

Recommendation 10.4

Similar provisions concerning the breakdown of the relationship because of domestic violence should apply to women who have been sponsored as fiancées, whether the breakdown occurred at any time before marriage, or after marriage but before an application for residence has been lodged.

Recommendation 10.5

The Department of Immigration and Ethnic Affairs should ensure as a matter of priority that data on previous sponsorships by an individual are collected and available to all posts from a centralised database.

Recommendations 10.6

The Migration Act should be amended to provide that in order to address the problem of serial sponsorship, the Department of Immigration and Ethnic Affairs is authorised to collect information about a sponsor's previous sponsorships of spouses and fiancées and, where there is at least one prior sponsorship, any record of violence.

Where there has been at least one prior sponsorship of a spouse or fiancée the Department of Immigration and Ethnic Affairs should investigate whether injunctions for personal protection or restraining orders have been made against the sponsor, whether there have been any breaches of those orders and whether he has any criminal convictions for offences of personal violence. The sponsor should be notified of the purpose of collection and use of the information when lodging the application to sponsor.

Recommendation 10.7

Where a prospective sponsor's record shows past violence or previous sponsorships, that information should be drawn to the attention of the applicant by a departmental officer in an individual interview. The information must be provided in a culturally and linguistically appropriate manner and the interviewer must be satisfied that the applicant understands the nature of the information provided.

Departmental officers who are involved in processing applications involving spouse and fiancée sponsorship should be trained properly to handle the sensitive issues which might arise, particularly in interview procedures. Training in cultural awareness and cross-cultural communication skills is essential.

In view of the sponsor's duty to disclose relevant information, the Department of Immigration and Ethnic Affairs should prosecute sponsors who supply false or misleading information.

Recommendation 10.8

General interviews of applicants for immigration as spouses or fiancées, including information as to their legal rights, should occur at an early stage in the application process.

Recommendation 10.9

Information about legal rights, particularly in relation to family law, domestic violence and deportation, should be made available to immigrants by service providers, with special attention to women in remote areas. Written information should be available in different languages and the use of community radio should be encouraged.

11. Violence and women's refugee status

Recommendation 11.1

Guidelines should be drafted for refugee decision-makers on the appropriate treatment of cases involving:

- persecution of women by assault, sexual torture or sexual harassment arising from military or government officials or from private citizens
- persecution arising out of cultural practices or attitudes to women
- gender-based persecution arising out of social policies set by government
- other instances of gender-based persecution
- the application of principles of state protection to these kinds of persecution.

Recommendation 11.2

The Department of Immigration and Ethnic Affairs should do all it can to ensure that its research into country conditions includes information on the political, civil, social and economic status of women, the incidence of reported sexual and domestic violence against women, the protection available to women who are the targets of violence and social attitudes affecting women.

Recommendation 11.3

Guidelines for refugee decision-makers should incorporate an approach to the ground of 'political opinion' under the Refugee Convention that encompasses the political activities of women.

Recommendation 11.4

Guidelines for refugee decision-makers should incorporate an approach to 'membership of a social group' under the Refugee Convention that permits the group to be defined by reference to an experience of severe discrimination or harsh or inhuman treatment that is distinguished from the rest of the population and from other women.

A sub-group of women can be identified by reference to their vulnerability for physical, cultural or other reasons to violence, including domestic violence, in an environment that denies them protection.

Recommendation 11.5

The guidelines on women refugees should be drafted by an independent body of experts and should be included in the Migration Regulations.

Recommendation 11.6

Guidelines for the handling of claims by women asylum seekers should be drafted to assist decision-makers and others involved in the refugee determination process. These guidelines should address application forms, separate interviews and methods of interviewing.

Recommendation 11.7

Gender awareness training should be required for all interviewers, and decision-makers in refugee matters. Issues of sexual violence and domestic violence should be included as part of this training.

Recommendation 11.8

The right of asylum seekers to seek review of adverse decisions in the Federal Court should be retained.

Recommendation 11.9

The provisions for release of 'young boat people' should be extended to permit the release of families with a young child where it is in the best interests of the child.

Recommendation 11.10

Early consideration should be given to whether the applicant might succeed on humanitarian grounds. The Refugee Review Tribunal should be given power on rejecting a refugee application to make a recommendation to the Minister on humanitarian grounds.

Recommendation 11.11

The term 'persecution' should be explained in the PAM II in a manner consistent with the wording of the Migration (1993) Regulations. The PAM should draw the attention of decision-makers to the breadth of meaning attaching to the term at law and should attempt to address issues of specific concern to women.

Recommendation 11.12

The Department of Immigration and Ethnic Affairs should investigate and redress the gender imbalance in its offshore refugee/ humanitarian program by issuing guidelines that

- allow a more flexible assessment of the attributes of women applicants and
- give credit for the practical skills, general capabilities and the positive attributes of stable family groups.

Recommendation 11.13

The current eligibility requirement in the women at risk program, of lack of protection of a male relative should be replaced by a requirement of lack of adequate family support. In cases of doubt or particular need this requirement should be waived.

Recommendation 11.14

The Department of Immigration and Ethnic Affairs should evaluate and monitor the Women at Risk program with a view to ensuring that places are fully utilised. To this end it is recommended that:

- information regarding the Women at Risk program and how to access it should continue to be made available to the major organisations who have access to women and their dependents in refugee camps around the world
- information regarding the Women at Risk program and how to access it should be made available to foreign immigration departments

In the process of monitoring and evaluating the Women at Risk program consideration should be given to increasing substantially the numbers of place available.

12. Violence and criminal law

Recommendation 12.1

In the development of the uniform criminal code, women's perspectives should be actively sought. This should include consultation with appropriate experts on those issues. It should also include a re-examination of the proposals relating to self-defence and provocation.

Recommendation 12.2

A Violence Against Women Unit should be established within the human rights area of the federal Attorney-General's Department. Its role should include annual reporting on the implementation of the National Strategy on Violence Against Women, the development and promotion of minimum standards to be met by service providers and through State and Territory legislation, and the promotion of a 'best practice' model for dealing with violence against women in the home.

PART I - GENERAL MATTERS

1. Introduction

Background to the reference

The reference

1.1 The Prime Minister, the Hon Paul Keating, announced the reference to the Australian Law Reform Commission on 10 February 1993 as part of the Government's *New National Agenda for Women*. The terms of reference were given to the Commission by the then federal Attorney-General, the Hon Michael Duffy, on 8 February 1993.

The terms of reference

1.2 The terms of reference require the Commission to consider whether laws should be changed, or new laws made, within the power of the Commonwealth in order to remove any unjustifiable discriminatory effects of those laws on women with a view to ensuring their full equality before the law. They also require the Commission to consider and recommend non-legislative approaches to ensuring women's equality. The Commission is to take into account Australia's obligations under international law. As a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Australia has undertaken to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.³ As a party to the International Covenant on Civil and Political Rights (ICCPR) Australia must guarantee the equal protection of human rights to men and women without discrimination and equality before the law. The terms of reference are set out at the beginning of this report.

History of the reference

The discussion paper

1.3 A Discussion Paper (DP 54) was published in July 1993.⁴ It contained a discussion of gender bias, discrimination and the legal protection of equality. It covered a wide range of topics including, access to justice, family relationships and marriage, economic life, employment, participation in public life and the legal profession. Public comment was invited on questions in the paper on these topics.

Response to DP 54

1.4 **A record response.** The Commission received in a few months an unprecedented public response to DP 54. Approximately 600 submissions have been received of which 273 were presented at oral hearings. Many submissions were made on behalf of, or described the experiences of, large numbers of women.⁵ In terms of the number of people represented it appears to be a record for the Commission.

1.5 **Voices of many women.** Submissions came from all parts of Australia and from a wide range of individuals and organisations. Most submissions were from individual women who described their experiences with the law. Others were from legal practitioners and academics, community based services and many others including government and non-government agencies. The community based services included women's health centres, women's legal and non-legal services, community legal and non-legal centres and services dealing with sexual assault and domestic violence.

1.6 **Concerns raised.** While the Commission received responses to each topic the major issue raised was women's access to justice particularly in the context of violence against them. Others included women's participation in the legal profession, legal rights to social security, family law, the position of women in employment, access to credit and media portrayals of women.

Consultations

1.7 The Commission has contacted many organisations and individuals who made submissions to discuss further issues they raised. The Commission has also consulted with government departments, legal centres, judges, lawyers and academics, health and community workers, non-government organisations and women's groups. Commission members and staff have participated in conferences on women and the law. The Commission thanks the consultants listed at the beginning of this report and many others who have generously given their time to assist the work.

The Interim Report (ALRC 67)

1.8 In March 1994 the Attorney-General tabled the Commission's Interim Report in Parliament.⁶ ALRC 67 dealt with the most urgent problem raised in submissions, the failure of the legal system to give women equal access to justice particularly, but not exclusively, where they have been subjected to violence from their partners or ex-partners. It outlined the links between violence, access to justice and inequality before the law. It documented women's experience with the legal system in different regions of Australia. It concluded that there were great disparities in the degree of protection women received, and that there was a need for improvement in all areas. ALRC 67 made recommendations in critical areas:

- development of the law
- community legal education
- legal advice and referral
- legal representation
- research and data collection
- court processes and facilities.

ALRC 67 recognised that women's lack of equal access to justice was a national issue and required a national response. It recommended the establishment of a National Women's Justice Program (NWJP) to coordinate reforms necessary to ensure women's equality before the law. It would be a four year program administered through existing administrative structures at federal, State and Territory levels. Ideally it would be a joint federal and State/Territory program, funded by governments at both levels. Through the program the federal government will be fulfilling its international obligations in recognising that equality for women requires equal access to justice. In terms of CEDAW, the program is a non-legislative measure to promote equality.

Response to the Interim Report

1.9 The recommendations in ALRC 67 on the NWJP have been strongly supported in the community. Many people appreciated the direct quotes from women contained in the Report. Others objected to the Commission presenting only one side of each story. The Commission received more comments and submissions and requests for more detailed information about some aspects of the program. It responds to those in this Report.

Activities since the Interim Report

Many other studies affecting women and the law

1.10 The commencement of this reference coincided with a period of exceptional public concern for, and media interest in, women's justice issues. This has continued throughout the period of the work on this reference. Studies on gender bias have been completed and others begun at different levels of government. In all this activity the ALRC has been both catalyst and beneficiary. Some major initiatives are listed in the Interim Report. Since the publication of that Report there have been further developments. Some examples are:

- the Access to Justice Advisory Committee Report on *Access to Justice: an action plan*
- the Senate Standing Committee on Legal and Constitutional Affairs Report on *Gender Bias and the Judiciary*
- the Office of Legal Aid and Family Services study of *Gender Bias in Litigation Legal Aid: An Issues Paper*
- Department of Arts and Administrative Services and the Office of the Status of Women review of the honours system for women and ethnic minorities
- Department of Employment Education and Training funding for the development of gender inclusive material in all undergraduate core curriculum law courses
- establishment of three inquiries on aspects of gender bias by the New South Wales Ministry for the Status and Advancement of Women: *Gender Bias and the Criminal Justice System*, *Gender Bias and the Civil System*, *Gender Bias and the Legal Profession*
- report by the Tasmanian Women's Consultative Council on women and sex discrimination and state wide consultation for a future report on women and justice
- establishment by the Chief Justice of the Western Australian Supreme Court of a taskforce investigating gender bias in the judiciary
- several conferences on legal issues affecting women, most notably a National Conference on *Challenging the Legal System's Response to Domestic Violence*
- Melbourne University Institute of Education report on *Steps Towards Addressing Gender in Educational Settings*
- the New South Wales Ministry for the Status and Advancement of Women report on *Aboriginal Women and the Law* (due in June 1994)
- the Joint Standing Committee on Foreign Affairs, Defence and Trade report on *Sexual Harassment in the Australian Defence Force* (due in June 1994).

Other initiatives include the examination of gender issues in the Department of Social Security and the Department of Immigration and Ethnic Affairs.

Access to Justice Advisory Committee

1.11 In October 1993 the Attorney-General and the Minister for Justice established the Access to Justice Advisory Committee, chaired by Professor Ronald Sackville, to consider ways in which the legal system could be reformed to enhance access to justice and make the legal system fairer, more efficient and more effective. The Committee gave in principle support for the Commission's recommendation of a National Women's Justice Program.⁷ It recommended a national strategy for improving access to justice to attempt to achieve equality of access to legal services, national equity, and equality before the law.

Conclusions

1.12 Work undertaken by the Commission and by others has exposed how serious and widespread the problems of women's inequality are. Despite apparent and real gains over the last decade women still experience discrimination. Gender bias is embedded in the legal system. Addressing specific issues in particular areas will not solve the problem unless that underlying bias is also addressed.

Scope of this report

Improvements to existing laws and procedures

1.13 The terms of this reference and the response to issues raised have required the Commission to consider necessary improvements to promote equality for women within the existing legal system and more fundamental changes that need to be made to the structure of the legal system. It has been described as an exercise in engineering and architecture. The challenge is to make the laws and their application more equal. This part of the final report concentrates on improving the existing legal system. The second part will discuss broader change. The Commission indicated in its Interim Report that it would provide more detail on the issues discussed there. This report contains further discussion and recommendations about access to justice and violence.

The Sex Discrimination Act 1984 (SDA)

1.14 The principle existing federal legislation dealing with equality for women is the SDA. In chapter 3 the Commission explains why it does not achieve equality for women. It recommends amendments to that Act to make it more effective.

Access to justice

1.15 The operation of the law by courts, police, lawyers and judges is largely the product of men's ideas and actions and largely remains in the control of men. The needs of women, where they differ from men's, are still not being fully met by the system. The issue of access to justice, which should be addressed by the NWJP, is raised in chapters 4, 5, 6 and 7 where recommendations are made to improve women's access to justice, including improvements in community legal services and changes to court procedures.

Legal system's response to violence

1.16 The legal system fails to deal effectively with violence perpetrated by men on women. It sanctions and perpetuates means by which men keep women in an unequal position. The legal system itself is a factor in the subordination of women. It is important that decision makers understand the role of violence in the way the law impacts on women's lives. Sometimes violence is clearly identifiable. Often it is hidden, but influential, in directing a woman's actions and affecting the way the law operates in relation to her. Ideally all federal Acts, regulations, policies and programs would be analysed to determine their adequacy as a response to the prevalence of violence against women in Australia. The Commission chose, in the time available, to analyse two areas of federal law, family law and immigration, because they were identified in submissions as being in need of reform. Recommendations to amend the *Family Law Act 1975* (Cth) are contained in chapter 9 and proposed amendments to the *Migration (1993) Regulations* and changes to immigration procedures are contained in chapters 10 and 11.

Completing the reference

1.17 The Commission intends to publish a further document in this reference, the second part of its final report. That report will be completed and released later in the year. The second part of the final report will discuss the meaning of equality and gender bias in the fabric of the legal system. That discussion will include an overview of areas of substantive law in which gender bias is evident, as recommended in the recent report on gender bias of the Senate Standing Committee on Legal and Constitutional Affairs.⁸ The Commission will also recommend a new Act to provide an equality guarantee, to complement the SDA and provide a broader coverage for women's equality in law. Responses to the reference have covered a very wide range of issues affecting women. The Commission will not be able to deal with them all in the time available for completion of the reference. It is yet to select the remaining matters to be addressed in its final publication but will address the equal participation of women in the legal profession, an issue which was raised frequently in submissions.

2. Gender inequality

Introduction

This chapter

2.1 In the last decade there have been marked changes in social attitudes towards the role of women and improvements in some aspects of women's position in Australian society. Despite this, women still suffer widespread inequality in many areas of their lives, some of which were reported in *Half Way to Equal* in 1992⁹ and canvassed in DP 54 in 1993. Other examples have been revealed in more recent studies.¹⁰ This chapter updates and expands on information provided in DP54 and reports on the submissions received which raised these issues. It highlights those areas of public, social and private life in which problems of inequality are apparent and widespread: access to financial resources, discrimination at work, representation in legal and political institutions, violence against women and the undervaluing of women's contribution to society. The law does not exist in a vacuum and the Commission's work on equality before the law must necessarily take account of the position of women in Australian society.

Women's social position has not improved

2.2 The evidence suggests that the position of women has not improved significantly in recent years. While there have been minor improvements in some areas such as the representation of women in politics and among the judiciary, in other areas such as paid work, women's position appears to have remained static or in some cases worsened. Submissions to the Commission and media coverage of women's issues since the publication of DP54 also show that, while dissatisfaction with the legal system's response to women continues, the facts underlying women's inequality are still not widely known.

Connections between women's social and legal inequality

2.3 Women's social inequality is fundamentally connected to their inequality before the law. Their unequal social status prevents or inhibits them from gaining access to the legal system on an equal basis with men. This fact was clearly demonstrated by submissions to the Commission and discussed in the Interim Report and it provides a basis for recommendations made in Part 3 of this report, Access to Justice. While the relationship between the law and women's social and economic status is a complex one, it is clear that each can have an important impact upon the other. The law not only reflects women's unequal status. It can also cause, perpetuate and exacerbate that inequality. In this report, the Commission deals with these issues in the context of the *Sex Discrimination Act 1984* (Cth) and the legal system's response to violence against women.

The experiences of particular groups of women

2.4 ***Women have different experiences of inequality.*** Although women as a group suffer disadvantage, their experiences can vary considerably. Factors such as age, race, marital status, family responsibilities, cultural background, sexual orientation and disability have specific social and legal ramifications. In particular, they can adversely affect women's ability to obtain equal access to justice.¹¹ This issue will be explored throughout this Report. For example, the experiences of the 26.1% of the female population aged over 50¹² are likely to be different from those of younger women. Older women are much less likely than younger women to have pursued as much education as men or enjoyed continuous employment.¹³ For example, the bar on the employment of married women in the Commonwealth Public Service was only abolished in 1966. Between 1966 and 1992 the labour force participation rate of married women increased from 29% to 53%.¹⁴ Other groups of women, for instance lesbians, rural women, young women, women offenders and sex workers, made representations to the Commission about the particular social problems they experience and the relationship of those problems with the law.¹⁵

2.5 ***Women of non-English speaking and Aboriginal and Torres Strait Islander background.*** Women from non-English speaking backgrounds and Aboriginal and Torres Strait Islander women comprise 16% and 1.2% of the Australian female population respectively. According to the 1991 Census, 517 100 people (3.2% of the Australian population) do not speak English well or at all.¹⁶ Many Aboriginal and Torres Strait Islander people do not speak English as their first language or are not proficient or confident in its use.¹⁷

Evidence was presented to the Commission that men of non-English speaking background are more likely than women of non-English speaking background to have opportunities to learn English, particularly in the context of continuing restrictions on funding for English classes and increased emphasis on language training for employment purposes.¹⁸ The Commission was told that women from non-English speaking background need more flexible access to English classes as it is often difficult to cope with learning a new language soon after arrival in Australia, when settling home and family issues have priority for women.

Women's contribution to the community is undervalued

Women's unpaid work

2.6 Women's work undervalued. Women's roles in the Australian economy are often not recognised sufficiently or not recognised at all. Most economic measures include only those activities traded for money. Most unpaid work is performed by women, often in conjunction with paid work.¹⁹ Women in the rural sector have the double burden of home work and considerable work on the farm that is not counted as productive labour. The term 'sleeping partner - non-productive' has been used to classify these women.²⁰

2.7 Domestic work. Women in Australia have always been and remain primarily responsible for domestic work (such as cleaning, child-care, cooking, shopping), despite their increasing rate of participation in the paid work force.²¹ Indeed, where women live with men and both adults are engaged in paid work outside the home, women are overwhelmingly responsible for the domestic work.²²

2.8 Women's child-care responsibilities. A significant proportion of the female population (almost a third) have dependent children.²³ For women with dependent children, the extent of participation in the paid workforce is related to the age of the youngest child in the family unit. In couple families, the participation rate of women with the youngest child aged less than five years is 47.1% of which 16.1% work full time and 31% part time. Once the youngest child reaches school age participation rates increase to 66% of which 29% is full time work and 37% is part time. In sole parent families, 95% of which are headed by women, participation is even less at 33.4% of which 12.6% is full time and 20.8% part time where the child is less than five years. This increases to 55.1% of which 20.8 % is full time and 34.3% part time when the child is of school age.²⁴ Women are also more likely than men to be responsible for the provision of informal child-care to other people's children. Grandmothers are the most frequent main providers of care (43%). In a gender breakdown of all main informal child carers 57% were identifiable as female. These statistics show that for a significant period of most women's lives as mothers and as grandmothers they are at home full time or part time caring for children.²⁵ The implications of that fact are not fully acknowledged either by the law or within the legal system generally.²⁶ The legal system must accommodate the needs of those women and to a lesser extent those men who are part or full time carers of children.

2.9 Women's other caring responsibilities. Women have primary responsibility for the care of many others: their partners, older people, people with disabilities or others unable to care for themselves independently.²⁷ Women constitute 72.6% of those providing care at home for the elderly, 75.9% of those caring for adults with a mental illness and over 60% of those caring for adults with a disability.²⁸ The Human Rights and Equal Opportunity Commission (HREOC) Report on Human Rights and Mental Illness pointed out in relation to older people with mental illness

'community care' is a misnomer which obscures the reality of who is doing the 'caring'. It does not mean care by the community or even by the family, but most frequently by wives, daughters and daughters-in-law.²⁹

For myself I have experienced the look of dismissal that comes when you say your job is (just) caring for your children and running the household. Ironically you are probably working harder than ever . . . But not only are you working hard, you find your opinions and standing are much diminished now you are just a housewife. The women clients I worked with at Legal Aid had experienced similar attitudes at times when they came in contact with the law, not only in the area of Family Law, but in their dealing with DSS, Banks, etc.³⁰

'Disadvantaged' is by no means related to the important and worthwhile work a woman does in the home but to the way our laws disregard the vital contribution women working as household labourers make to the economic well-being of our society. For example, a discriminatory perception maintained in our laws when it casts and classifies a woman as 'dependent' on her husband for financial support. The effect of this is to demean and to demoralize and also to trivialize what is a valuable asset to society; the homemaker.³¹

It is interesting . . . to compare cases where men have received greater compensation for the loss of their female partner's ability to provide domestic labour than women receive for loss of their earning power. There is clearly a recognition that the cost of replacing this work is far greater than the value attributed to it when it is done on an unpaid basis.³²

Media portrayals of women

2.10 The portrayal of women in the media contributes to the community's stereotyped attitudes about them. Stereotyped portrayals can have a negative impact on the treatment women receive from the legal system. For example, they can have a negative impact on women's credibility before police, lawyers and judges. The problems reported to the Commission focused on criminal cases, particularly those involving sexual assault and domestic violence.

. . . the mass media have a central role in the formation of 'commonsense' understandings about contemporary life, and the role of women. . . [These] 'commonsense' perceptions of women are based on stereotyped views, which do not accord with the reality of women's lives. [They] can play a role in the adjudication of cases (a) through the operation of the laws of evidence, including the doctrine of judicial notice (which enables facts in issue to be held as proved, without formal evidence being tendered); or (b) more generally, by influencing attitudes of judges and others towards women as witnesses and participants in cases. The media-reinforced stereotypes may become the 'facts' which are adopted in the decision-making, or become the norm of behaviour against which particular women are assessed.³³

2.11 **The portrayal of non-English speaking background women.** In submissions from non-English speaking background women's groups it was argued that whilst both women and men from a non-English speaking background are often trivialised in the media, this media stereotyping particularly harms women.³⁴ For example, it has been submitted that Asian women are often stereotyped as mail order brides or as prostitutes; and more generally non-English speaking background women are portrayed as mothers, wives, domestic cleaners and sex objects.³⁵ Women of non-English speaking background experience serious difficulties with the legal system.

As females they are more vulnerable to violence and harassment, they have diminished credibility before the law and their negative portrayal impedes in many areas in their lives just as other women in this country . . . These devaluing assumptions about non-English speaking background women diminish their dignity and self esteem . . . biased and pre-determined assumptions about a woman's credibility, her low status in the community and the negative perceptions of non-English speaking background women as trouble makers may discriminate in her access to justice.³⁶

Women have less access to financial resources than men

Women are poorer than men

2.12 **Women earn less.** Women are less likely than men to be in the paid workforce.³⁷ Women of non-English speaking background are less likely than other women to be in the paid workforce³⁸ and to hold post-school qualifications.³⁹ Even when women are in the paid workforce, their average earnings are less than men's. This was discussed in detail in DP 54.⁴⁰ More recent statistics show little change.⁴¹ There is a range of reasons for this. For example, women are much more likely to be in part time employment than men.⁴² Women are also more likely than men to be employed on a casual rather than permanent basis.⁴³ Another reason for women's lower earnings is that they are predominantly employed in jobs of lower status and pay than are men.

2.13 **Women are more dependent on others.** Fewer women earn income than men and generally speaking those women who do earn income earn less than men. Women are also much more likely than men to be single parents.⁴⁴ Therefore women have a higher level of economic dependence on individuals and on the government than men. This situation is reinforced in a number of areas of the law.⁴⁵

*The social security system is a form of institutionalised disadvantage which emphasises payment as 'dependence' not as a right to a guaranteed minimum income nor an acknowledgment of the value of women's unpaid labour. As such the social security system does little to espouse the right of women to an independent and adequate income. Rather it is a system which reinforces women's subordination to the state or men for their economic survival.*⁴⁶

2.14 **Women are poorer after separation.** Women's standard of living generally declines after separation. A 1993 study by the Australian Institute of Family Studies found that women's incomes decreased much more dramatically after separation than men's did.⁴⁷ When interviewed in 1984 both men and women reported falls in household incomes since the last year of their marriages. Even though both men and women reported losses in income, women, on average, suffered greater losses (34% losses compared to 4%). By 1987, men's average household incomes had returned to pre-separation levels whilst women continued to experience losses of about 26%.⁴⁸ However, projections on how the Child Support Scheme might impact on this suggest that the financial position of the custodial mother would improve under the Scheme.⁴⁹ Women were much more likely than men to have been dependent on social security at some stage after separation.⁵⁰ One reason for this is that women are more likely to have been financially dependent on their partners before separation. Women are also more likely to be primarily responsible for the care of the children of the marriage after separation and to have a lower earning potential than their former partners. Women's poverty after separation has an important bearing on the problems women face in bringing or sustaining family law cases and on their need for legal aid.⁵¹ The problem of men using continuing family law litigation to deplete their ex-partners is discussed in Chapter 9.

2.15 **Access to credit.** Women have less access to credit than men. Credit is now frequently used to purchase both everyday items and more expensive assets such as a house or car. In 1990 the NSW Anti-Discrimination Board reported that it was still receiving complaints from women alleging that they had been discriminated against in seeking credit and finance.⁵² The Commission also received submissions on this point.

I have never held or used a credit card nor had a loan . . . in my almost 40 years of life, thus I have no credit ratings, but my husband has credit ratings as he held the mortgage and other small loans plus a bankcard in his name. The loan was refused on the grounds that I was a woman and that I had no credit rating . . . for the last 14 years since I have had children and ceased paid employment, the only money that I received for clothes, shoes, excursions, pre-school, school fees for the children and myself was my family allowance of \$80 per fortnight. I did that and also managed to save a small amount . . . (I had no

*access to my husband's wages). That in itself should prove that I am capable . . .*⁵³

Submissions also referred to women who were silent partners in business transactions. Banks continually failed to treat women equally in transactions, usually involving them as guarantors for loans.⁵⁴

*Banks still treat . . . [women] as chattels of their husbands and still enforce highly discriminatory policies when it comes to disputes involving family finances. . . (In recent cases) the Bank's actions were motivated by a misguided belief that husbands automatically have implied heightened authority status in all transactions.*⁵⁵

Submissions indicated that women are sometimes not told of the various implications of signing documents which in many cases make them liable to pay enormous debts incurred by their husbands.

*I signed an overdraft secured on our house for my husband's business of \$15 000 with the Trust Bank of Tasmania. It was later extended to \$40 000. I also signed, unknowingly, an 'all monies' clause which obliged me to repay any other borrowings incurred by my husband. At no time was I advised of the substance of that obligation by the bank, or of its existence. My husband's business got into financial difficulties and I was forced to repay to the bank a sum of approximately \$90 000 covering all his other debts that I did not know about.*⁵⁶

A lack of understanding concerning the risks involved in becoming a guarantor for a partner's loan has caused financial difficulties for many women. There are particular difficulties for rural women in this regard.

Women suffer inequality in the workplace

2.16 The *Sex Discrimination Act 1984* (Cth) (SDA) and the anti-discrimination laws which operate in the States and Territories⁵⁷ deal with issues of discrimination on the grounds of sex, marital status and pregnancy. The SDA is discussed in detail in Chapter 3. The SDA defines discrimination in the workplace as direct or indirect and makes sexual harassment unlawful.

Sexual harassment

2.17 Sexual harassment has been recognised as an important obstacle to women's equal participation in employment. It is now unlawful under federal, State and Territory laws. Nonetheless, from the significant number of complaints made under the SDA about harassment and the findings of recent research, it is clearly still a major problem in the workplace.⁵⁸

*[C]omplaints . . . reveal that some of the forms of discrimination and harassment that women experience in their employment are simply not prohibited by the legislation at present. Women workers, for example, often endure sexual harassment from customers. Many cases of harassment in service industries such as hotels and clubs, in hospitals and in libraries have been brought to the attention of the centre. Discrimination and sexual harassment may also come from persons who are in positions of power, such as elected members of local councils, whose behaviour is not caught by the legislation. . . . In areas of employment seen as traditionally 'male' the problems of sexual harassment of women is a particular problem. Here the prevailing 'male' culture is more deeply entrenched, often at all levels up to and including management. Women who work in these areas also are less likely to be able to have the support of fellow female workers and thus can find it more difficult to gather the courage required to confront that system alone.*⁵⁹

Women receive fewer work-related benefits

2.18 The legal rules and practices which underpin paid work are based partly on traditional concepts of the male 'breadwinner' and female 'secondary worker' in a family.

*Historically, the legal system (through the industrial commission) has constructed part-time work as women's work. This continues to be the case. However the idea that part-time work is women's work is based on gendered assumptions concerning work; it is still assumed that men are breadwinners and that women are primarily responsible for work in the home and entitled to paid work in the workforce only in so far as they can accommodate that responsibility. The law has thus played a major role in attracting women to part-time work, simply by ensuring that often it is the only type of paid work available to them.*⁶⁰

2.19 Part time jobs usually have lower security, pay, status and benefits than full time jobs and casual jobs have almost no benefits at all. Part time and casual employment can constitute the entire paid career of working women who are thereby deprived of such basic rights as sick leave, recreational leave, and access to training and adequate superannuation.⁶¹ Whilst it is important for women that part time work be available because of their family responsibilities, current work practices for part time and casual employees do not provide this flexibility of arrangement with any security.⁶²

2.20 **A sex-segregated workforce.** Australia has the most sex-segregated workforce in the OECD.⁶³ There is no sign that it is diminishing.⁶⁴ Women's occupations are concentrated in sales, clerical and 'caring' professions such as community services.⁶⁵ Gender segregation also occurs within occupational groupings. For example among salespersons, women are under-represented in investment, insurance and real estate, and over-represented among tellers, cashiers and ticket salespersons.⁶⁶ In 1986 the Industrial Relations Commission rejected the concept of 'comparable worth' which would have enabled work of different kinds to be evaluated according to gender neutral criteria.⁶⁷ The introduction of enterprise bargaining has also raised concern that the new industrial relations system will be detrimental to women's interests.⁶⁸ It is feared that those in the strongest positions in the workplace (who are predominantly men) will reap most of the rewards from enterprise bargaining.⁶⁹

*In face-to-face bargaining sessions, social conditioning of both male and female participants could mean expectations by either that women should be less aggressive and assertive. Some women may also have less confidence due to lack of negotiating experience, lack of formal education and a dislike of confrontation as well as greater time restraints due to family responsibilities . . . the disadvantaged bargaining position of women in enterprise bargaining will be exacerbated for women from non-English speaking background, Aboriginal and Torres Strait Islander women and women with disabilities.*⁷⁰

Women's career advancement restricted

2.21 Women's lack of career advancement over time is clearly illustrated by a 1994 study which found that three-quarters of the women surveyed had either stayed at the same skill level or moved backwards in their working lives.⁷¹

*. . . the inflexibility of the working environment makes combining a career in private practice . . . with a family virtually impossible. Women must be involved in designing workplaces that meet the needs of women, as well as men, and men should begin to acknowledge their shared responsibility for child care and household tasks.*⁷²

Professional women: the glass ceiling

2.22 The restrictions of women's advancement is particularly evident in the professions. More women are now entering the professions. Nonetheless, they are still constrained by what has been described as a 'glass ceiling', which has resulted in women remaining under-represented at the higher levels of these occupations. This has been found across a wide range of fields, such as management,⁷³ accounting,⁷⁴ the Public Service,⁷⁵ education⁷⁶ and law.

... there have been suggestions from university management that a doctorate or equivalent standing is required for promotion to senior lecturer and above . . . a doctoral requirement is particularly disadvantageous to women because the timing of such an imposition will usually coincide with the point in time when a woman is bearing children and looking after them in their youngest years . . . These practices include the placing of great emphasis on employment and promotion decisions upon what has been achieved by the applicant in the last five years . . . such women are viewed as if the valuable professional experience, teaching or research abilities gained before a career break, have somehow magically disappeared . . . mak(ing) promotion for women who return to work after a career break, and who retain primary child-care responsibilities, almost impossible.⁷⁷

Women are restricted in contributing to legal and political institutions

The legal profession

2.23 The comparative lack of women in positions of influence within the legal profession affects women's access to justice. A woman who needs to make use of the law finds herself in a doubly alien environment, as a non-lawyer and as a woman. The legal profession plays an important role in shaping the law which has largely developed without the insights and perceptions which women within the profession can bring.

2.24 ***Women concentrated in the less prestigious and well-paid areas of the profession.*** DP 54 described in some detail the unequal status of women in the legal profession. While half of all law graduates are female, they still constitute only a small fraction of partners in law firms.⁷⁸ Women are also concentrated in areas of legal practice which are seen as less prestigious and less financially rewarding, such as family law, welfare and administrative law.⁷⁹ It is therefore not surprising that female lawyers generally earn less than male lawyers.⁸⁰ Women's lack of representation is also apparent in other areas of the legal profession. Of the 1515 barristers practising in NSW, only 158 (10.4%) are women.⁸¹ Almost 90% of all federal judicial offices are held by men.⁸² Women are also more likely to drop out of legal practice altogether. A survey by the Law Society of NSW found a higher attrition rate for female solicitors in the first five years of practice than for male solicitors.⁸³

Political life

2.25 ***Women's equal participation in politics essential to women's legal equality.*** The equal participation of women in political institutions and the legislative process is clearly essential if laws are to give equal weight to the concerns, needs and perspectives of women. Not only does the relative absence of women from positions of political power help undermine the serious consideration of women's claims to equality, but legislation is the only means of effecting change in the law quickly and directly.

2.26 ***Women under-represented in parliament.*** Women's right to participate in political life is fundamental to equal representation of the general community and to placing women's interests squarely on the political agenda. There has been a very slight improvement in women's representation in some areas. Overall between 1983 and 1993 the number of women MPs doubled.⁸⁴ There have also been moves in the Australian Labor Party at both a Federal and State level to adopt quotas for achieving a more equitable proportion of women MPs.⁸⁵ Submissions indicate that there is a need for concrete measures to improve women's access to political positions.

For years, the political parties have been talking about encouraging women to run for office, but with glacial progress. There are many reasons . . . the concentration on child rearing, inadequate spouse support, widespread community attitudes on the role of women - indeed all the reasons why women are under represented in the higher levels of business, the professions and the public service . . . Even the increasing recognition that women in the 45 plus range have a good twenty years' contribution to make after raising a family has only marginally expanded the pool of willing candidates . . .

*The right of women to aspire to and hold positions of power in the community on an equal footing with men, the equal right to represent the general community by being elected to parliaments has still not been acknowledged by men. Significant numbers of men, especially powerful and ambitious men, still seem very uncomfortable with the idea of women as political equals . . . the idea of women in parliament is not new . . . what is new, I think, is a sense of impatience among women, a new determination among women that it can no longer be left to men to grapple with the modern complexities of our global village . . .*⁸⁶

2.27 Federal parliament and cabinet. Women presently make up 10.2% of the House of Representatives and 22.4% of the Senate.⁸⁷ There are 31 members of the present federal ministry; three are women. There is one woman in Cabinet among 19 ministers and two women among 10 Parliamentary Secretaries.⁸⁸ There has never been a woman Governor-General or Prime Minister.

2.28 State and Territory and local government. There are 618 parliamentarians in all the Australian State and Territory parliaments and of these 99 (16%) are women.⁸⁹ In local government there are 8535 elected officials, of whom 1654, 20.2%, are women.⁹⁰ Women are Governors in two States, South Australia and Queensland. A woman heads only one Australian government, in the Australian Capital Territory. The first woman was elected to head a government in May 1989.⁹¹ Only three States or Territories have had women as Premiers.⁹²

2.29 Non-English Speaking Background and Aboriginal and Torres Strait Islander women. There is a distinct lack of women from non-English speaking backgrounds and indigenous women in mainstream politics at federal, state and local levels. These women who are politically active are generally found within ethnic or indigenous community organisations. Major barriers to broader political participation include lack of education and English language skills and cultural expectations of a family role.⁹³

Women experience violence

Introduction

2.30 Women's experience and fear of violence constitute another significant aspect of gender inequality.

Prevalence of violence

2.31 Men's violence against women, in the home and elsewhere, and its treatment by the legal system, are among the main concerns held by women who made submissions to the Commission.⁹⁴ Violence cannot be separated from women's lack of access to justice and women's inequality.

The inalienable truth is that violence against women and children is pervasive in Australian society, afflicting women from all ages, cultures, classes and background. This violence is expressed in a range of different ways which historically have been artificially compartmentalised inaccurately reflecting the complex interplay of these different forms. Rape, sexual assault, domestic violence, sexual harassment, child sexual abuse, sex discrimination, gender bias are some of the terms used to define the physical, sexual, emotional, psychological, racial, cultural, social, economic, and spiritual violence; human violations which may be perpetrated in the one act. Empirical evidence demonstrates that women are at greater risk of violence at the hands of someone they know and in the context of a home than by a

stranger or in public. . . . Through women speaking out about this social reality what has become more publicly overt is that violence against women and children is legitimised and reinforced through the very structures in place to protect their rights; for example, by the legal system itself.⁹⁵

Most violence is perpetrated by men. In 1991-2, 89% of all homicide offenders were men⁹⁶ and over 90% of those charged with serious assault, robbery and sexual assault were men.⁹⁷ Men are also the main victims of violent crimes. When women kill they are likely to kill those who have previously perpetrated violence against them.⁹⁸

Domestic Violence

2.32 The number of relationships in which women are subjected to violence is not known. In one month (November 1993) there were 3009 cases of domestic violence reported to the police in six States and Territories in Australia.⁹⁹ However, it is thought that many cases are not reported to the police. Research in 1992 at Royal Brisbane Hospital found that more than one in five women presenting to the Accident and Emergency Department had been subjected to violence by their partner at some stage of their adult lives.¹⁰⁰ According to Marriage Guidance Australia, almost 40% of couples attending marriage guidance counselling report violence.¹⁰¹ Historically, domestic violence has not been regarded as a real crime by police.¹⁰² Although this attitude is changing, it persists in many situations.¹⁰³

Homicide

2.33 The extreme end of the domestic violence spectrum is homicide by a partner. Many female homicide victims are killed by their partner.¹⁰⁴ Many of these killings are preceded by a history of domestic violence, as are many spousal homicides by women.¹⁰⁵ Aboriginal and Torres Strait Islander people and migrants seem to have particularly high rates of domestic homicide.¹⁰⁶ Aboriginal women in the Northern Territory are 28 times more likely to die from homicide than any other Australian person.¹⁰⁷

Sexual assault

2.34 Sexual assault is overwhelmingly a crime committed by men against women.

One woman who had been raped by two work colleagues after leaving their annual Christmas party told the Commission of her experience in the court room at the committal proceedings.

In the court room, I gave evidence for four hours. They asked me why I did not fight back, why I had so many drinks, why I had asked them to help me find a taxi and not someone else. Apart from the (sexual assault) counsellor . . . I was the only woman in the room. When their barrister asked me whether I am a vegetarian, I was confused, and upset. I said "no". He then asked me if I ate meat. I said "yes". When he then asked me why I did not bite off their penises, I became distressed and looked around the court room. At that moment I realised that this was not their trial. The magistrate, like all the others looked at me, waiting for my response. I don't remember the rest of my evidence. The lawyers for the Department of Public Prosecutors said nothing. They were angry with me because after this, . . . [the accused men] were not committed to stand trial. The DPP said my evidence didn't stand up, that my story didn't hold, that I was a bad witness. What finally got me, was I never got to tell my story. It was as if what happened to me did not matter, they were so preoccupied with the words I chose to express it. I felt like the player in a game that I had never played before, and was treated as if I was cheating in some way.¹⁰⁸

Between 1989 and 1991 the average annual rate of sexual assaults reported to the police was nine times higher for women than men.¹⁰⁹ The average annual rate of sexual assault was 38.3 of every 100 000 people in NSW in these years according to police statistics.¹¹⁰ However, studies suggest that only a small proportion of sexual assaults (a third or less) are reported to the police.¹¹¹ Sexual assault is an area in which women are

particularly likely to face problems with the legal system. For example the sexual assault victim may feel that she, rather than the perpetrator, is on trial. The Commission received numerous other submissions from women with similar experiences.¹¹²

Conclusion

2.35 At a very basic quantitative level, measured only through statistical data, women have not achieved equality with men in all major aspects of their lives. It has been assumed by some that once women gradually made their way into male-dominated professions such as law, it would only be a matter of time before they made their way to the top of these professions. The statistics indicate that there are no grounds for such optimism. The inequality as outlined in this chapter - in women's social position and as targets of violence, in women's lesser access to financial resources, to employment and equal pay and to positions of influence in political and legal institutions - all adversely effect the ability of women to use and receive justice from the legal system. If women's access to the law is to be improved and the law is to apply equally and to deliver equality, these broader issues must also be addressed. At present the law does little to redress the effects of inequality. In fact it can actually reinforce and amplify these effects. The facts reported in this chapter establish the need for the law to play a more positive role in redressing discrimination and promoting equality. The recommendations in Chapter 3 deal specifically with legal measures help to achieve that end. The final Report Part 2 will take up these issues further, with an equality guarantee for women.

PART II - MEASURES TO COMBAT DISCRIMINATION

3. Strengthening the Sex Discrimination Act 1984

Introduction

3.1 In the Discussion Paper (DP 54), the Commission examined the concepts of equality, discrimination and bias.¹¹³ It discussed ways of protecting equality through a legal or constitutional guarantee and ways of amending the *Sex Discrimination Act 1984* (Cth) (SDA). The Commission takes the view that equality in law, as required by CEDAW, needs to be understood in a different and more substantial sense than merely equality before the law. Any understanding of equality must take account of the social and historical disadvantages of women and how that has affected the law.¹¹⁴ This contextualised theory of equality requires a different legal response than can be encompassed by the SDA. These issues will be considered in the final report part 2. Nonetheless, the SDA is the most useful law presently available to women who suffer discrimination. This chapter discusses the SDA as a vehicle for overcoming discrimination and disadvantage experienced by women. It considers the scope and operation of the Act and it makes proposals for amendments to address some of its deficiencies.

Description of the SDA

History

3.2 The SDA is the principal federal Act on gender equality. It is the product of compromise and negotiation. Its passage through Parliament was marked by controversy as great as that which marked the passage of the *Native Titles Act 1993* (Cth) recently.¹¹⁵ As a result of the controversy and the compromises, the Act is at best a partial implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Recent reviews and reports have recommended reforms to it.¹¹⁶ It has been amended several times since 1984 to make it more effective.¹¹⁷

A package of legislation

3.3 **The SDA.** The SDA provides that discrimination on the ground of sex,¹¹⁸ marital status¹¹⁹ or pregnancy¹²⁰ is unlawful in specified areas of public life: work, education, accommodation, disposal of land, provision of services, goods and facilities, clubs and the administration of federal laws and programs.¹²¹ The SDA prohibits both direct and indirect discrimination. Direct discrimination is any policy or action which discriminates overtly on the basis of sex, marital status or pregnancy.¹²² Indirect discrimination occurs when an apparently gender neutral rule or policy has very different effects on women and men, and one group is disadvantaged by the operation or effect of the rule.¹²³ The Act also prohibits sexual harassment in certain areas.¹²⁴ Dismissal on the ground of family responsibilities is also unlawful.¹²⁵

3.4 **The Affirmative Action Act.** The SDA is supplemented by the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth) (AAA).¹²⁶ The AAA requires large employers to develop and implement measures to secure the advancement of women within their organisations.¹²⁷ A key purpose of the AAA is to prevent discriminatory practices before they result in complaints under the SDA or the State and Territory anti-discrimination legislation. Under the AAA employers are required to submit periodic reports on their progress. The only sanction, until recently, to enforce these obligations is being named in Parliament for failure to submit a report or for an inadequate report. The government now requires compliance with the AAA by employers for eligibility for 'government contracts for goods and services and specified forms of industry assistance'.¹²⁸

3.5 **A review of the AAA.** The Affirmative Action Agency conducted a review of the effectiveness of the AAA in 1992 and found that 'many employers now have a greater understanding of the need to take proactive steps to provide equal opportunity for women'.¹²⁹ The review decided against introducing additional penalties. It discussed whether to lower the threshold of the application of the AAA, that is to cover employers with less than 100 employees.¹³⁰ This was rejected as it was considered that it would strain the limited resources of the Agency and the capacity of small employers to implement effective affirmative

action programs.¹³¹ The review also pointed out that there is currently no consideration of the quality of affirmative action measures implemented by relevant employers.¹³² While approximately 95% of relevant employers submit reports as required under the AAA¹³³ no indication is given of what those measures achieve.¹³⁴ The Agency expressed the opinion that 'the standard achieved by most employers in the development of their program is too low to have made any substantial impact on the statistical profile of women's employment'.¹³⁵ The review made a number of recommendations to strengthen the Act. It recommended the establishment of a 'tripartite advisory committee' incorporating representatives from employers, employee representative groups and the Affirmative Action Agency to 'develop standards and codes of practice for compliance which will contribute to the development of quality affirmative action programs'.¹³⁶ The goal of this tripartite process is to establish 'minimum compliance standards'.¹³⁷

3.6 *The Commission's approach.* Affirmative action is one of the most important ways to improve the situation of women in the workplace. It was suggested to the Commission that there needs to be more 'bite' to the legislation.¹³⁸ As a result of the recent review of the AAA and the Affirmative Action Agency the Commission has not inquired further into their operations.

3.7 *State and Territory anti-discrimination legislation.* Each State and Territory has its own anti-discrimination legislation except Tasmania.¹³⁹ The various State and Territory anti-discrimination laws cover a number of grounds of discrimination within the same Act, including discrimination on the ground of sex.¹⁴⁰ They generally have the same framework and concept of equality and contain similar provisions. Some of the State and Territory Acts have wider provisions¹⁴¹ and a more active role for the Commissioner under the Act.¹⁴²

The role of the SDA

3.8 *What does the SDA do?* Federal, State and Territory anti-discrimination laws have the same general philosophy. They provide remedies for an individual, or in some cases a group, subjected to discrimination on a ground specified in the Act. The SDA makes sex discrimination and sexual harassment unlawful in certain circumstances. It provides for investigation and conciliation of complaints of unlawful conduct under the Act. Complaints of discrimination are made to the Human Rights and Equal Opportunity Commission (HREOC),¹⁴³ which must refer the matter to the Sex Discrimination Commissioner (SDC) who may inquire into the matter and try to effect a settlement by conciliation.¹⁴⁴ Complaints which are not resolved or cannot be resolved by conciliation are referred by the SDC to HREOC for a hearing, in which the person bringing the complaint is required to establish that unlawful discrimination has occurred.¹⁴⁵ Determinations made by HREOC must be registered with the Federal Court as soon as practicable after the determination is made.¹⁴⁶ After registration the respondent has 28 days in which to apply to the Federal Court for review of the determination.¹⁴⁷ If the respondent does not make such an application the determination will become an enforceable order of the Federal Court.¹⁴⁸

3.9 *The SDA is important.* The SDA is recognised as an important measure addressing discrimination against women. It has been particularly useful in redressing complaints of discrimination in employment and of sexual harassment.¹⁴⁹ The procedure is generally considered to be less expensive, less formal and less intimidating or threatening than the traditional adversarial process.¹⁵⁰ Those using the SDA are predominantly women. Most women currently making complaints are young (between 15 and 24 years of age) and are employed in what have been termed 'low status' positions.¹⁵¹ It is a measure of the success of the Act that women feel comfortable making a complaint under it. Laws such as the SDA and the AAA play an important part in changing social attitudes. They are tangible evidence of a public commitment to equality.¹⁵²

3.10 *The SDA is limited in a number of ways.* While the SDA plays a useful role for the individual complainant it is limited in philosophy and scope. It aims to eliminate identified acts of discrimination within defined spheres of activity. This approach suggests that discrimination is an isolated aberrant incident rather than the common experience of many women. It is unable to address the systemic nature of discrimination.¹⁵³ Many submissions commented on the limitations of the SDA.¹⁵⁴ Recent reports¹⁵⁵ and commentaries on the SDA and anti-discrimination legislation generally¹⁵⁶ also refer to the deficiencies of the Act. These are both practical and conceptual and affect both complainants and respondents. In particular submissions said that the Act

- *reveals a limited understanding of equality:* Submissions commented upon the fact that the SDA relies upon the notion of formal equality, particularly in relation to direct discrimination.¹⁵⁷ However, the indirect discrimination provisions acknowledge that treating women and men the same can result in discrimination against women.
- *fails to create positive rights:* As a consequence of the focus on individual complaints the SDA reacts to complaints rather than providing a right to equality, free from discrimination.¹⁵⁸
- *has an unnecessarily complex definition of indirect discrimination.* Submissions commented on the present difficulty in attempting to satisfy the four part test required by the SDA to make out a complaint of indirect discrimination. Indirect discrimination is seen as one of the most important areas in which the SDA needs to become more effective.¹⁵⁹
- *is unable to address systemic discrimination.* Submissions to the Commission commented that it is difficult to deal with systemic discrimination within the individual complaint-based framework of the SDA.¹⁶⁰ Systemic discrimination was identified as a major issue that needs to be confronted to make the Act more effective in combating discrimination.
- *confined to specific areas of public activity.* The SDA has as its focus areas of public activity, such as employment, education, accommodation and provision of goods and services. A submission argued, however, that much of the inequality women experience finds its source in the private sphere.¹⁶¹
- *has many exemptions.* The number of exemptions from the application of the SDA provisions are seen to limit its effectiveness to achieve its goals.¹⁶²
- *is unable to take account of women's diversity.* Submissions commented on the diversity among women and the fact that the SDA appears to consider women as a homogenous group. The SDA fails to take account of the manner in which other factors such as racial background, sexuality, disability or age interact with the experience of sex discrimination.¹⁶³
- *relies on conciliation as the primary mode of resolution.* Submissions received by the Commission discussed positive and negative aspects of conciliation in the resolution of complaints under the SDA.¹⁶⁴
- *awards damages at a low level.* Submissions considered that the relatively low level of awards made in sex discrimination complaints that go to hearing indicates a failure to take proper account of the nature of the discriminatory action or policy, or the injury and harm suffered by the women¹⁶⁵
- *is not properly understood by the legal profession.* Submissions considered that lawyers and members of the judiciary appear not to understand fully the principles behind anti-discrimination legislation. They expressed concern over the growing legalism in the resolution of anti-discrimination matters.¹⁶⁶

Current proposals to amend the SDA

3.11 *Half Way to Equal.* In 1992 the House of Representatives Standing Committee on Legal and Constitutional Affairs reported on its inquiry into equal opportunity and equal status for women in Australia.¹⁶⁷ This was a comprehensive inquiry into the operation of the SDA. The Committee found that the Act had greatly assisted women over the ten year period of the Act's operation but that women in Australia still lacked equal opportunity and equal status. As a result of the findings and recommendations of this inquiry a number of amendments were made to the SDA.¹⁶⁸ Other amendments proposed by the Committee are subject to recently released discussion papers¹⁶⁹ and the remainder are still being considered by the government.¹⁷⁰

3.12 *Review of permanent exemptions.* In 1992 the Sex Discrimination Commissioner (SDC) reported on her review of five permanent exemptions provided for in the SDA.¹⁷¹ The exemptions reviewed are those for State instrumentalities,¹⁷² educational institutions established for religious purposes,¹⁷³ voluntary bodies,¹⁷⁴ acts done under statutory authority¹⁷⁵ and sport.¹⁷⁶ One of the exemptions has been partly removed in its

application to industrial awards,¹⁷⁷ but the other four recommendations of the SDC have not yet been implemented. The Attorney-General's Department has stated that it will consider the review of the permanent exemptions as part of its proposed stage three implementation of the *Half Way to Equal* report.¹⁷⁸

3.13 Attorney-General's discussion paper. The Attorney-General released a discussion paper, *Proposals to amend the Sex Discrimination Act 1984*, in October 1993.¹⁷⁹ This paper called for submissions on four recommendations from *Half Way to Equal*:

- general prohibition of discrimination and equality before the law¹⁸⁰
- indirect discrimination provision¹⁸¹
- special measures provision¹⁸²
- spousal identity to be specified as included in marital status.¹⁸³

The Commission made a submission on these issues. They are discussed in this chapter in addition to other proposals that will strengthen the SDA.

Discrimination

General prohibition of discrimination

3.14 The proposal. The Attorney-General asked whether the SDA should contain a general prohibition of discrimination.¹⁸⁴ The *Racial Discrimination Act 1975* (RDA) contains a general provision making it unlawful to do 'any act involving a distinction, exclusion, restriction or preference' which has the 'purpose or effect of nullifying or impairing' the equal enjoyment of rights on the basis of race, colour, descent or national or ethnic origin.¹⁸⁵ The SDA does not contain a comparable provision or give a general right to women to be free of discrimination. Rather, it makes narrowly defined acts of discrimination unlawful and provides a procedure through which an individual can make a complaint about discrimination that falls within that definition.

3.15 A strong legislative statement. According to the Attorney-General, a general prohibition of discrimination in the SDA would represent a strong legislative statement that all acts of discrimination against women, on the grounds of sex, pregnancy and marital status, and sexual harassment are unlawful and 'will not be condoned by the Australian society'. It would be a statement of symbolic importance.¹⁸⁶ This approach is supported by a number of submissions.¹⁸⁷ It should be built upon the provisions of CEDAW which defines discrimination against women in a purposive sense and establishes the substantive and positive right of women to equality and the enjoyment of human rights.

'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁸⁸

3.16 The Commission's approach. As one option, the Attorney-General's discussion paper proposed including in the SDA that the general prohibition of discrimination should adopt the definition of discrimination in CEDAW. This would tie the SDA more closely to the provisions of CEDAW and would ensure that women's rights are seen as human rights. It would also give effect to CEDAW art 2(b) which calls for the prohibition of all discrimination against women. The remedies currently available under the SDA should be available for a substantiated complaint under the general prohibition.¹⁸⁹ In its submission to the Attorney-General the Commission supported the proposal but warned that the exemptions in the SDA would limit the effectiveness of a general prohibition of discrimination. Without their removal the prohibition would remain only of symbolic value.

3.17 Human rights and fundamental freedoms. The general prohibition aims to ensure the enjoyment of human rights and fundamental freedoms. The RDA specifies that the reference to human rights and fundamental freedoms is to those rights and freedoms in the Covenant on the Elimination of All Forms of

Racial Discrimination (CERD) art 5.¹⁹⁰ Similarly, the proposed general prohibition of discrimination for the SDA must specify what is meant by human rights and fundamental freedoms. The Commission recommends that the phrase should refer to those rights and freedoms articulated in CEDAW, the International Convention on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Recommendation 3.1

a) The SDA should contain a general prohibition of discrimination in accordance with CEDAW article 1.

b) The reference to human rights and fundamental freedoms in the general prohibition of discrimination should relate to the rights and freedoms articulated in CEDAW, the ICCPR and the ICECSR. These international conventions provide an expanded reference point for the rights and freedoms to be protected by a general prohibition.

A general guarantee of equality before the law

3.18 ***Guaranteeing equality.*** DP 54 discussed whether Australian law should contain a general guarantee of equality in the enjoyment of rights and freedoms.¹⁹¹ Submissions received by the Commission agreed on the need to examine other means of guaranteeing equality for women outside the provisions of the SDA.¹⁹² Many submissions argued that current laws are not effective in ensuring human rights for women and in implementing Australia's obligations under international instruments.¹⁹³

3.19 ***Attorney-General's discussion paper.*** The Attorney-General's discussion paper proposed introducing into the SDA an 'equality before the law' provision modelled on RDA s 10.¹⁹⁴ Under that section if persons of a particular race, colour or national or ethnic origin do not enjoy a particular right or enjoy it to a limited extent because of a law or a provision of a law, then 'notwithstanding anything in that law' the right shall be enjoyed to the same extent.

3.20 ***Effectiveness of a guarantee in SDA.*** With a general guarantee of equality along the lines of the RDA the SDA would more fully implement Australia's international obligations under CEDAW and ICCPR.¹⁹⁵ However, its effectiveness would be limited unless the exemptions were removed or appropriately amended, in particular the exemptions relating to the States and Territories and to acts done under statutory authority.¹⁹⁶ The experience under the RDA has been that the laws of the States and Territories are most likely to be challenged.¹⁹⁷

3.21 ***The Commission's view.*** The Commission's submission to the Attorney-General supported the inclusion in the SDA of a provision modelled on RDA s 10 if the exemptions contained in the SDA were removed. However, in the Commission's view, 'equality before the law' is a limited notion. There is a need for a guarantee of equality with a broader definition and a comprehensive operation unconstrained by the particular areas of application and range of exemptions of the SDA. This issue will be taken up in final report part 2.

Indirect discrimination

3.22 ***Definition.*** A policy or action may be gender neutral in appearance but have different effects on women and men. Indirect discrimination is the application of what is often referred to as a 'facially' neutral condition or requirement that can be met by one gender more often or more easily than by the other and that is unreasonable.¹⁹⁸ It is irrelevant whether the effect or impact of the policy or action is intentional or unintentional.

Example

A woman seeking employment is told that the employer requires that all its employees be above a certain height. The employees work with the public and the employer considers that taller people are more impressive and so better for business. There is nothing about the job that requires any particular height. The requirement is arbitrary and unreasonable. The employer may or may not intend to discriminate against women. However, because men on average taller than women more men would meet the requirement than women. The requirement therefore indirectly discriminates on the basis of sex against the woman seeking the job.

3.23 *The significance of indirect discrimination.* Indirect discrimination has been identified as a key issue in discrimination law. It recognises that discrimination does not merely manifest itself in obvious or direct ways but rather is disguised in policies and practices which appear to apply to all persons equally.¹⁹⁹ Submissions commented that the SDA must become more effective in addressing indirect discrimination.²⁰⁰ An effective indirect discrimination provision has the 'capacity to strike at fundamental discriminatory employment structures and policies' and can 'illustrate how discrimination can be built into a system without any outward signs of unequal treatment'.²⁰¹ The indirect discrimination provisions in the SDA for a number of reasons have not realised this potential.²⁰²

3.24 *Proving indirect discrimination.* The main reason for the limited effectiveness of the indirect discrimination provisions is the difficulty involved in proving a complaint. To succeed a complainant must prove that

- a) she was required to comply with a requirement or condition
- b) which a substantially higher proportion of men complies or is able to comply, and
- c) which is not reasonable having regard to all the circumstances of the case, and
- d) with which she does not or is not able to comply.²⁰³

This four-part test places a heavy onus on the person alleging the discrimination. It is a test which is very difficult to satisfy. This was the subject of a number of submissions received by the Commission.²⁰⁴

3.25 *Attorney-General's discussion paper.* The Attorney-General's discussion paper raised some legislative and non-legislative options that could assist the Act to address indirect discrimination more effectively. The non-legislative measures were to increase funding to HREOC to educate employers and employees about indirect discrimination, to provide funds for public interest test cases on indirect discrimination, and for HREOC to develop guidelines to assist complainants in formulating a complaint of indirect discrimination.²⁰⁵ The Commission supports the non-legislative measures as they address some women's difficulties in access to justice. The suggested options for legislative amendment were as follows:

- reversing the onus in indirect discrimination cases²⁰⁶
- replacing the present provisions with ones that are 'simpler'²⁰⁷
- widening the powers of the SDC under SDA s 48(b) to allow her to investigate broad systemic discrimination without a complaint.²⁰⁸

3.26 *Reversing the onus to prove reasonableness.* Under the present law the complainant bears the onus to prove that the respondent's requirement or condition was unreasonable in the circumstances. The Attorney-General's discussion paper proposed that the onus be reversed, that it should be for the alleged discriminator to prove that the requirement or condition was reasonable in the circumstances.²⁰⁹ Submissions received by the Commission supported this approach.²¹⁰ The evidentiary burden of proving reasonableness should be placed on the alleged discriminator who is the person best placed to provide that evidence.²¹¹ The reversal of the onus of proof would bring the SDA into line with the approach taken in a number of overseas jurisdictions²¹² and with the *Anti-Discrimination Act 1991* (Qld).²¹³

3.27 Simplifying indirect discrimination. The indirect discrimination provision in the *Discrimination Act 1991* (ACT) is a 'greatly simplified expression of the concept'.²¹⁴ The complainant does not have to prove that a substantially higher proportion of the opposite sex is able to comply, or that the complainant is unable to or does not comply with the imposed condition. The ACT definition relies on an effects test: there is indirect discrimination where the imposed condition has the 'effect of disadvantaging persons' because of their sex, marital status, pregnancy or family responsibilities.²¹⁵ The *Discrimination Act 1991* (ACT) provides in section 8:

- 1) for the purposes of this Act, a person discriminates against another person if
 - a) . . .
 - b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging persons because they have an attribute. . . (sex, marital status or pregnancy);
- 2) paragraph (1)(b) does not apply to a condition or requirement that is reasonable in the circumstances;
- 3) In determining whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include:
 - a) the nature and extent of the resultant disadvantage;
 - b) the feasibility of overcoming or mitigating the disadvantage; and
 - c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement.²¹⁶

It is unclear under the ACT legislation which party bears the onus to prove reasonableness.²¹⁷ The Commission considers that a simpler definition like section 8 of the *Discrimination Act 1991* (ACT) which also specifies that the onus is on the respondent to establish that the condition imposed is reasonable, would be more effective in protecting women from indirect discrimination than the current provision in the SDA.

3.28 What is to be considered reasonable? The SDA does not set out the matters to be considered in determining whether a condition or requirement is reasonable. The Attorney-General's paper proposed that reasonableness should be tested by considering whether the respondent has pursued the least discriminatory option in the circumstances. The *Discrimination Act 1991* (ACT) on the other hand requires consideration of the 'nature and extent of the disadvantage', the 'feasibility of overcoming or mitigating the disadvantage' and the proportionality of the disadvantage to the result sought to be achieved by the person imposing the condition.²¹⁸ This provision is more specific than the 'least discriminatory option' test. It requires the respondent to have considered other requirements and conditions and therefore provides the complainant with an argument that the respondent could have pursued another option.²¹⁹ It also requires consideration of the disadvantage that results from the imposition of that requirement or condition.

Recommendation 3.2

- a) A simpler definition of indirect discrimination should be included in the SDA, along the lines of the *Discrimination Act 1991* (ACT) s 8(1)(b). The matters listed in *Discrimination Act 1991* (ACT) s 8(3), which are to be considered in determining reasonableness in the circumstances, should also be included.
- b) The amendments should make it clear that the respondent must prove, on the balance of probabilities, that the condition or requirement imposed or proposed to be imposed is reasonable in the circumstances.

Systemic discrimination

3.29 Definition. Systemic discrimination refers to practices which are absorbed into the institutions and structure of society and which have a discriminatory effect. It describes 'a complex of directly and/or

indirectly discriminatory (or subordinating) practices which operates to produce general . . . disadvantage for a particular group'.²²⁰ A Canadian case has described systemic discrimination in the following terms:

The concept of systemic discrimination is perhaps as hard to define as such discrimination is to identify. It is not identical in concept to indirect . . . discrimination. [Indirect] . . . discrimination involves requirements which do not, on their face, discriminate on a prohibited ground, but which affect a group identifiable on a prohibited ground in such a way as to have a discriminatory effect on that group. While [indirect] . . . discrimination may be quite subtle in its operation, often the effect is fairly obvious. Most people today, for example, recognise that minimum height requirements discriminate against women . . . The concept of systemic discrimination, on the other hand, emphasizes the most subtle forms of discrimination . . . It recognizes that long-standing social and cultural mores carry within them value assumptions that contribute to discrimination in ways that are substantially or entirely hidden and unconscious. Thus, the historical experience which has tended to undervalue the work of women may be perpetuated through assumptions that certain types of work historically performed by women are inherently less valuable than certain types of work historically performed by men.²²¹

A submission to the Commission from the NSW Ministry for the Status and Advancement of Women provided a similar description of systemic discrimination:

*Systemic discrimination is based on assumptions and stereotypes about the appropriate role of women in society and the maintenance of an ideology of subordination. It is pervasive and it is harmful because it reflects attitudes and prejudices towards women as a group and which cannot be addressed solely through individual anti-discrimination remedies.*²²²

Systemic discrimination affects the equality status and opportunities of many women and is not always easy to identify or deal with as a single act of discrimination against one individual woman. It is of particular relevance to non-English speaking background women who find it difficult to establish the 'causal link' between their ethnicity or sex and the discrimination which results in their disadvantage, for example by narrowing their opportunities to enter the workforce.²²³ Legislation providing for affirmative action and special measures are seen as important ways of redressing and counteracting systemic discrimination.²²⁴

3.30 **CEDAW.** While CEDAW does not refer expressly to systemic discrimination it does deal with the issues which underlie it. Article 5(a) states the obligation of State Parties to take appropriate measures to 'modify'

the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

CEDAW emphasises the importance of addressing all forms of discrimination and requires that effective protection should be established against 'any act of discrimination'.²²⁵

Case study: investigation into the situation of women prisoners held in men's prisons in Victoria

Moirá Rayner, then Equal Opportunity Commissioner (EOC) in Victoria, in her submission discussed her role in investigating the conditions of women prisoners in Victoria, in a matter which had been referred to her for investigation although there had been no formal complaint.²²⁶ The Commissioner conducted her investigation between April 1991 and June 1992. It primarily concerned women prisoners in Barwon prison, which is primarily a men's prison.²²⁷ Claims of discrimination included:

- visitors for the women prisoners were routinely strip searched whereas the visitors for men prisoners were not
- women prisoners had less access to facilities for education, recreation, employment and training and inadequate access to medical, psychiatric and counselling services
- women were confined to a small area due to difficulties in keeping the prison populations segregated
- as women were a smaller population in the prison they were subject to greater scrutiny and

- incurred more disciplinary infractions
- prison staff considered women prisoners a 'nuisance . . . unfeminine or deviant'.

The EOC made formal findings of discrimination and attempted to negotiate with the Department of Justice, Office of Corrections on those findings. The Department took some steps to improve the conditions of the women prisoners, however discrimination continued.²²⁸ The Commissioner concluded that she could not resolve the matter through conciliation and referred it to the Equal Opportunity Board for hearing. Moira Rayner stated that the power to conduct such investigations:

*It is particularly important that bodies such as [the Equal Opportunity Commissioner should have the independence, the legal authority and the resources to investigate systemic discrimination without an individual complaint as I have done in the case of women prisoners - those who are inherently unlikely to be able to advocate [on their own behalf]. The capacity of people like me to investigate serious discrimination against particular groups of disadvantaged people who cannot be expected to make individual complaints is very important. This role must be understood and supported.*²²⁹

3.31 *How is systemic discrimination recognised under the SDA?* The SDA, like CEDAW, does not refer expressly to systemic discrimination. Acts of discrimination affecting individuals or groups may come within the prohibition of indirect discrimination. Systemic discrimination would fall within the terms of the proposed general prohibition of discrimination.²³⁰ It can be manifested in acts of indirect discrimination. The Commission does not consider it practicable to define systemic discrimination as an additional type of discrimination. This could prove confusing to potential complainants and may limit its usefulness. The Commission prefers the approach of recognising systemic discrimination within the recommended general prohibition of discrimination.²³¹

3.32 *Difficult to address through a complaint based system.* Because of its nature systemic discrimination is not readily open to complaint by an individual. Often it is not seen as discriminatory at all as it does not match the common understanding of what discrimination is and how discrimination manifests itself. It is often unconscious. Submissions to the Commission suggest that the individual complaint based system of the SDA is not adequate to address systemic discrimination and that there is need for something more.²³² The SDC said that the SDA needs to move away from 'a complaint based system to an Act which can address broad systemic discrimination' and that the SDC needs powers and adequate resources to enable her to investigate and report on systemic discrimination without an individual complaint.²³³

Ways of dealing with systemic discrimination

3.33 *Introduction.* An effective way to address systemic discrimination is to give the SDC a range of powers to deal with it. This part of the chapter considers the kinds of powers that could be conferred on the SDC. Some of these were raised in DP 54.²³⁴

3.34 *Existing functions and powers of the SDC.* The main function of the SDC is to deal with individual complaints. She has the power to inquire into alleged infringements of the Act that are the subject of complaint, to seek a settlement conciliation between the parties and to do anything 'incidental or conducive' to the performance of these functions.²³⁵ The SDA also provides the SDC with other roles. She may refer a matter, that has come to her attention otherwise than as the result of a formal complaint, to HREOC for an inquiry.²³⁶ In exercising this function the SDC is deemed to be the complainant for the purposes of the HREOC inquiry.²³⁷ This power has never been used.²³⁸ The potential of this section has not been exploited.²³⁹

3.35 *Should the powers of the SDC be extended?* A number of submissions to the Commission supported widening the SDC's powers under the SDA to enable her to initiate investigations into systemic discrimination.²⁴⁰ Possible additional powers would be:

- a power to investigate systemic discrimination on her own initiative without the need for a formal complaint²⁴¹
- a power to set standards similar to that contained in the *Disability Discrimination Act 1992* (Cth)²⁴²

- a reporting function comparable to those exercisable by the Privacy Commissioner under the *Privacy Act 1988* (Cth).²⁴³

A power to investigate systemic discrimination

3.36 Comparable powers of investigation. Commissioners under some of the State and Territory anti-discrimination legislation have broad powers to investigate matters on their own motion. For example, the *Discrimination Act 1991* (ACT) provides that the ACT Commissioner may investigate a matter that appears to be unlawful on her or his own motion.²⁴⁴ The Privacy Commissioner also has such a power under the *Privacy Act 1988* (Cth) when she or he believes that there may be an interference with privacy and it is considered desirable to investigate the act or practice.²⁴⁵ The SDA could be amended to provide the SDC with similar powers.

3.37 A matter that appears to be unlawful under the SDA. A matter for investigation may come to the attention of the SDC in various forms and from various sources. This power should not be confined to the investigation of matters that arise in the course of the exercise of her functions, as is required under some of the State and Territory legislation.²⁴⁶ The SDC should be allowed to investigate on her own initiative matters which appear to be unlawful under the SDA.²⁴⁷ This should include power to investigate those areas that are covered by exemptions, although the result of these investigations would only be the subject of a report.

3.38 The SDC should not be required to seek consent. The SDC should not be required to seek consent from HREOC to exercise this power because this may operate as a restriction on her or his operation.²⁴⁸ HREOC has a range of interests to secure and at times those interests may compete for priority in allocation of time and resources. Nonetheless the SDC has responsibility for over 50% of the population and over 50% of the complaints received under HREOC legislation are made under the SDA.²⁴⁹ These interests should not be subject to competing priorities. The size of the task of the SDC suggests that there should be an independent power to decide upon whether to conduct investigations of this kind.

3.39 Powers of discovery. The SDC has wide powers of discovery to investigate and conciliate a complaint under the SDA. Such powers should also be available to the SDC if she conducts an investigation on her own initiative. It needs to be made clear under the SDA that the power to obtain information and documents,²⁵⁰ the power to direct persons to attend a compulsory conference²⁵¹ and the power to require persons to produce documents at a compulsory conference²⁵² are not limited to dealing with complaints but may be utilised by the SDC in an investigation on her own initiative. The Law Reform Commission of Victoria in its review of the *Equal Opportunity Act 1984* (Vic) in considering the same issue recommended the following draft clause:

In conducting an inquiry, the Commissioner has the same powers as he or she has in dealing with a complaint of discrimination.²⁵³

A similar provision should be inserted in the SDA.

3.40 Endeavour to conciliate the matter. As a result of an investigation on her own initiative, the SDC should be required to attempt to resolve the matter with the organisation on a confidential basis. A similar requirement is imposed on the Privacy Commissioner under the *Privacy Act 1988* (Cth).²⁵⁴ In attempting to settle the matter in this manner the SDC may recommend measures that are to be implemented by the organisation so that discriminatory practices and policies are eliminated.²⁵⁵

Recommendation 3.3

a) The SDA should be amended along similar lines to the *Discrimination Act 1991* (ACT) s 73(2).²⁵⁶ Such a provision in the SDA could read as follows:

The Commissioner may, of her own motion, investigate conduct that appears to be unlawful under Part II of the SDA.

b) The SDC should not be required to seek the consent of HREOC to conduct an investigation of

her own motion.

c) In exercising this power the SDC should have all the powers of discovery that are currently available under the SDA to deal with a complaint.

Systemic discrimination: standard setting

3.41 ***The model of the Disability Discrimination Act 1992 (Cth).*** In addition to provisions prohibiting direct and indirect discrimination, the *Disability Discrimination Act 1992 (Cth)* (DDA) provides that standards may be set by the Attorney-General to eliminate discrimination on the ground of disability in specified areas.²⁵⁷ The DDA Disability Standards Working Group has been established within the Human Rights Branch of the Attorney-General's Department to work on the development of standards.²⁵⁸ HREOC has power to report to the Attorney-General on matters relating to their development.²⁵⁹ Standards formulated by the Attorney-General are to be laid before both Houses of Parliament. After the expiration of 15 sitting days the standards are to take effect in their approved form, unless disallowed.²⁶⁰ Once a disability standard takes effect it is unlawful for a person to contravene it.²⁶¹ There are to be no exemptions from the operation of the standards.²⁶² If a person or body contravenes a standard then a complaint may be made to HREOC under the DDA as if it was a complaint under the provisions of the DDA.²⁶³

3.42 ***The role of standards.*** The standard setting function of the DDA has been described as an 'innovation for Australian anti-discrimination law'.²⁶⁴ The objective is to 'specify requirements for equal opportunity and access for people with a disability in greater detail and with more certainty than is provided by the prohibition of discrimination by other provisions of the DDA'.²⁶⁵ Standards require positive compliance with the legislation and should indicate the practices and policies that should be the rule rather than implying that these practices and policies are 'special measures'.²⁶⁶ They may be useful as a means to set out clearly what is required by the Act and to set timetables for achieving that compliance. As a consequence the use of standards may reduce litigation and complaints under the Act. Standards should provide a process through which relevant groups can be consulted on the formulation of the content of the standards.²⁶⁷

3.43 ***Standard setting under the SDA.*** Standard setting under the SDA could deal with such matters as:

- the development of policies, for example, policies on recruitment and promotion
- increasing awareness of discrimination issues, for example, staff training and providing staff with relevant information
- establishing procedures to deal with complaints and with discriminatory practices
- the development of strategies to address structural issues and workplace culture which allow discrimination to persist.²⁶⁸

3.44 ***When should standards be formulated?*** If as the result of an investigation on her own initiative the SDC decides standards should be formulated in a particular area, she should recommend them to the Attorney-General for consideration. However, the formulation of standards should not depend upon a complaint or investigation. It could be initiated by the SDC directly, as proposed by the Attorney-General, or as requested by a person or organisation. Standard setting should be seen as a co-operative, consultative process.

3.45 ***Commission's approach.*** Standard setting would be a useful way to promote the objectives of the SDA,²⁶⁹ encourage compliance with its provisions and to indicate best practices under the Act. Many employers already contact the SDC asking for guidance on compliance with the SDA. Standard setting is a useful way to combat systemic discrimination and deal with respondents who repeatedly infringe the Act. It would give the SDC a positive role. The DDA provides a useful model. It is recommended that the SDA be amended to enable the Attorney-General to formulate standards in consultation with the SDC and relevant groups. It should be unlawful to contravene a standard declared by the Attorney-General under the SDA.

Recommendation 3.4

- a) The SDA should be amended to contain provisions modelled on the *Disability Discrimination Act 1992* (Cth) s 31 to provide the Minister with power to formulate standards to further the objectives of the SDA. Such standards should be laid before both Houses of Parliament within 15 days of their formulation. The standards should be able to be amended or disallowed by each House of Parliament as is provided for in the DDA.**
- b) It should be unlawful to contravene a standard under the SDA.**
- c) In devising standards the Minister should be required to consult with the SDC and relevant persons, groups or organisations.**
- d) The SDC should be given power to make reports to the Minister on matters relating to the development of standards.**

Systemic discrimination: making reports

3.46 *Model of the Privacy Act 1988 (Cth).* The Privacy Commissioner has the power to investigate a matter which appears to be unlawful under the *Privacy Act 1988* (Cth) but which has not been the subject of a formal complaint.²⁷⁰ After the investigation he or she is to endeavour to reach a settlement of the matter which gave rise to the investigation.²⁷¹ If conciliation is considered inappropriate or a settlement has not been reached, the Privacy Commissioner may report to the Minister on the results of the investigation.²⁷² The Commissioner has wide powers to make recommendations in the report.²⁷³ The report is to be laid before both Houses of Parliament.²⁷⁴ This process provides for public scrutiny of the outcome of the investigation.²⁷⁵

3.47 *Report making under the SDA.* The SDC suggested a similar model in her submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade on the inquiry into sexual harassment in the Australian Defence Force.²⁷⁶ Under this model the SDC would be able to investigate a matter, attempt to conciliate it and recommend to the respondent measures necessary to avoid discriminatory practices. If the respondent fails to implement those recommendations within the nominated time, the SDC could report to the Attorney-General setting out the recommendations and specifying the inaction of the respondent, including any reasons of the respondent for not complying with them. The Attorney-General should be required to table that report in both Houses of Parliament. A similar tabling power is available to HREOC under its Act.²⁷⁷

This would mean that steps could be taken on a confidential basis and public scrutiny and accountability only became a factor if the . . . [organisation] failed or refused to be accountable.²⁷⁸

3.48 *The Commission's approach.* In conducting an investigation on her own initiative the SDC should be able to report to the Attorney-General on the results of the investigation. A report may be made where the organisation investigated has failed to implement the SDC's recommendations or the SDC considers it inappropriate to conciliate. The report may contain recommendations, including recommendations for the development of standards, that would rectify the practices or policies which were the subject of the investigation. The standards recommended would be devised and implemented in a manner similar to that under the DDA and would be enforceable under the SDA. The reporting mechanism would be useful to the SDC in publicising the SDA and the discriminatory behaviour that had been the subject of the investigation.

Recommendation 3.5

- a) As a result of an investigation on her own initiative, in which the organisation investigated failed to implement the recommendations made by the SDC to improve the practices of the organisation to eliminate discrimination, the SDC may make a report to the Attorney-General.**
- b) The report should detail the conduct of the investigation, the findings of the investigation and the recommendations made by the SDC as a result of the investigation. The report should also contain the organisation's reasons for failing to implement the recommendations if reasons have**

been given.

c) The Attorney-General should be required to have a copy of the report laid before both Houses of Parliament within 15 sitting days.

d) The report may contain recommendations for the development of standards under the SDA.

Discrimination on the ground of marital status: identity of spouse

3.49 *Discrimination because of the identity of a spouse.* Discrimination on the basis of spousal identity occurs because of a perception that being married to a particular person could give rise to a conflict of interest.

A married woman applies for a position at a place of employment that is in direct competition to a business of which her husband is employed. In her interview she is asked questions about her husband's employment which imply that she would be a risk to the employer in that she may reveal 'trade secrets'. The woman is the best candidate for the position. However, because of the identity of her spouse she is not offered the position.

The reported cases suggest that women, and not men, are most often the target of discrimination on the basis of the identity of their spouse.²⁷⁹ These cases reveal a perception that women cannot be trusted to be free of their husband's influence or not to divulge confidential matters. A woman's capacity for professional behaviour is, in this way, judged according to her perceived incapacity to separate her public and private life. She is defined in terms of her relationships. These assumptions seem to be less frequently made in respect of men. Other contacts made in the course of employment, for example, business lunches, political relationships or familial relationships are not similarly characterised as causing a conflict of interest.²⁸⁰

3.50 *Is it unlawful?* The coverage of discrimination on the basis of spousal identity within the ground of marital status was an issue of considerable concern for many years because of a decision of the NSW Court of Appeal in *Boehringer Ingelheim Pty Ltd v Reddrop*.²⁸¹ The Court held that discrimination on the basis of spousal identity was not discrimination on the basis of marital status and therefore was not unlawful under anti-discrimination legislation. Although that decision has recently been given a restricted application²⁸² concern remains. The Commission received two submissions on this issue.²⁸³ It appears that there are few complaints made concerning this form of discrimination. One reason may be because of the impact a complaint would have on the careers of the complainant and their partner.²⁸⁴ As a result of the lack of formal complaints little interest is shown in discussions about the effectiveness of the marital status provision in the SDA.

3.51 *Methods to resolve conflicts of interest.* Prohibiting discrimination on the basis of spousal identity would encourage alternative methods of resolving apparent conflicts of interest. For example, a large employer could establish internal management procedures, including the transfer of one spouse to another position. Law firms handle potential conflict of interests among clients by creating notional 'chinese walls' which clarify who can have access and who cannot have access to information. As the Attorney-General's discussion paper notes, concerns about confidentiality are covered by existing laws dealing with breach of confidentiality, insider trading, secrecy and other matters.²⁸⁵ *Half Way to Equal* recommended that discrimination on the basis of spousal identity should be included specifically as a ground of discrimination in the SDA.²⁸⁶ The Commission supports this recommendation and urges that all relationships be included in the provision. A relationship of father/daughter or uncle/niece should not justify discrimination. Same sex relationships should also be protected from the effects of discriminatory assumptions about the nature of the relationship.

Recommendation 3.6

The SDA should be amended to prohibit discrimination against an individual on the basis of the

identity of a spouse or other person in a relationship with that individual. The prohibition should extend to all types of relationships, such as familial and same sex. It should not be limited to heterosexual, marital or de facto, relationships.

Special measures

The nature of special measures

3.52 ***The importance of special measures.*** The SDA provides that special measures to assist women to achieve de facto equality are not unlawful.²⁸⁷ Most submissions to the Commission which discussed anti-discrimination legislation emphasised the need to preserve special measures.²⁸⁸ They are 'an important way of overcoming historical disadvantage suffered by women'.²⁸⁹ Through the special measures provision the SDA affirms the need to assist women to overcome disadvantage. The provision validates services that redress current and systemic discrimination.

3.53 ***Opposition to special measures.*** Two submissions consider that special measures for women discriminate against men.²⁹⁰ One of these argued that special measures 'perpetuate discrimination' as they favour one sex over the other and are therefore inconsistent with formal equality.²⁹¹ The other submission considered that affirmative measures may 'serve...to entrench the discriminatory attitudes held by many in our Society' and that 'all the legislation in the world' will not redress the disadvantages women experience if 'the underlying societal attitudes remain discriminatory'.²⁹² No other submissions supported these views.

3.54 ***The SDA's approach to special measures.*** The SDA provides that special measures are not 'unlawful' if they assist women to achieve equality of opportunity.²⁹³ CEDAW refers to measures aimed at accelerating de facto equality, including equality of opportunity and treatment. One submission commented that the focus on equal opportunity in the special measures as contained in anti-discrimination legislation may serve to disadvantage 'the very people (the) legislation was meant to help'.²⁹⁴

*such an approach ignores historical and structural barriers which impede women's utilisation of formally equal opportunities.*²⁹⁵

A more fundamental problem is that the SDA defines special measures as discriminatory because they do not meet the standard of equal treatment. This is considered by many to be conceptually erroneous and problematic for women.

*[We] often [have] to respond to the claim that . . . [our organisation] is discriminatory because it does not provide services to men. It is a charge often made of services for women . . . The structure of the present anti-discrimination legislation encourages a view of equality as merely a matter of treating men and women the same. When equality is properly understood as an issue of power the justification for [special] services . . . is apparent.*²⁹⁶

In contrast CEDAW provides that such measures are not to be considered discrimination.²⁹⁷ It is inappropriate and contrary to CEDAW for special measures to be defined as discriminatory.²⁹⁸ *Half Way to Equal* acknowledged the problems with the special measures provision and expressed a need to clarify it.²⁹⁹ The Attorney-General's discussion paper said that despite recent expansive interpretations of the section it is still open to restrictive and narrow interpretations.³⁰⁰

3.55 ***Expressing equality.*** Special measures and affirmative action policies are required to achieve equality. Reporting in 1988 on the inclusion of rights and freedoms in the Constitution, the Constitutional Commission said that special measures should be seen as part of the 'clarification of the scope and purpose'

of an equality guarantee.³⁰¹ A recent Study Paper of the Ontario Law Reform Commission comments on how provisions for special measures ought to be understood and interpreted.³⁰² It discusses the relationship between the right to equality and the special measures provision of the Canadian Charter of Rights and Freedoms.³⁰³ It argues that special measures should be presented and understood as

an expression of equality, rather than an exception to it. Adopting such an approach affirms a primary commitment to the remedying of widespread, deeply entrenched and identifiable group-based patterns of inequality.³⁰⁴

3.56 *Services that can only be provided to members of one sex.* The SDA exempts services which by their very nature can only be provided to members of one sex.³⁰⁵ For example, services directed to pregnancy or breast cancer would be protected by this section. Like the exemption for special measures intended to achieve equality, services of this nature fall within the SDA's definition of discrimination but are not unlawful. This is contrary to CEDAW which states that measures 'aimed at protecting maternity shall not be considered discriminatory'.³⁰⁶ Recognition of women's biological differences from men, such as their capacity to bear children, should be seen as a way in which to promote the equality of women.

3.57 *The Commission's approach.* Special measures, both those that are directed towards achieving equality and those which can only be directed to women, are not defined as discriminatory under CEDAW and should not be discriminatory under the SDA. They are essential modes of contributing to equality. If they are to assist women to secure equality they must go beyond equality of opportunities and deal with effects, in accordance with CEDAW. Special measures should be understood as expressing and promoting equality.

Recommendation 3.7

a) SDA s 33 should be amended to provide for the full implementation of CEDAW article 4(1), as follows

Temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined by Division 1 or 2, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

b) SDA s 32 should be amended to provide for the full implementation of CEDAW article 4(2), as follows

The provision of services the nature of which is such that they can only be provided to members of one sex shall not be considered discrimination as defined by Division 1 or 2.

Applying the special measures provision

3.58 *Challenging special measures.* The determination that a program or policy is a special measure can only be made when the program or policy is challenged under the SDA and HREOC or when a court determines later whether it falls within the terms of the provision. It is unsatisfactory that the lawfulness of a program can be left in a state of uncertainty until it is challenged. This may hamper the establishment of programs designed to help women. For this reason the SDC provides an advisory service for those wanting to undertake special measures. She requests comprehensive information on the scope, duration and structure of the program and its rationale as a measure to overcome discrimination. She advises whether in her view the program complies with the Act. She has also developed criteria to assist persons and organisations to determine whether their program or policy falls within the terms of the provision. These criteria are clearly directed toward defending a challenge to the program or policy. However, the SDC's advice is not conclusive. The program or policy can still be challenged and found to be unlawful.

3.59 *Providing a surer defence.* To improve the effectiveness of the special measures provision the SDC should be able to declare that a program or policy is a special measure. Her declaration should be given recognition in the SDA as a defence to a challenge to the program or policy. The party alleging that the program or policy is outside the scope of the special measures provision should in that case bear the onus of proof. This would provide greater certainty for those developing measures to assist women. The SDC's

declaration would be subject to the HREOC President's powers of review.³⁰⁷ Failure to apply to the Commissioner for a declaration in advance should not preclude a finding that a program or policy is a special measure.

Recommendation 3.8

The SDC should have power to make a declaration that a measure is a special measure for the purpose of the SDA. Where the SDC has declared that a measure is a special measure a person challenging the measure under the SDA should bear the onus of proving that it is not. A measure may still be held to be a special measure by HREOC and the Federal Court even if the SDC has not made a declaration in relation to it.

Recognising multiple disadvantage

Different women have different experiences

3.60 Women of different backgrounds have different experiences and different needs. DP 54 referred to the particular situations of indigenous women, women from non-English speaking backgrounds, lesbians and women with disabilities.³⁰⁸ It also referred to the needs of women in rural and remote areas. A number of submissions addressed these issues.³⁰⁹ Some said that DP 54 should have referred also to the situations and experiences of older women and young women and girls.³¹⁰ A number of submissions commented that anti-discrimination legislation treats women as a homogenous group without recognising the multiple forms of discrimination some women may experience.³¹¹

Present anti-discrimination laws ignore difference

3.61 *Use of anti-discrimination legislation.* Those women who are 'routinely discriminated against on the basis of more than one factor, have greater difficulty conforming to the established framework' of anti-discrimination legislation.³¹² Women who experience discrimination on the basis of gender and on the basis of other factors, in combination or separately, appear to use the SDA and other anti-discrimination legislation less.³¹³ For example, Aboriginal and Torres Strait Islander women and women of non-English speaking backgrounds rarely lodge complaints under the SDA or the RDA.³¹⁴ In fact women in general lodge substantially less complaints than men under the RDA.³¹⁵

3.62 *The structure of federal legislation.* The federal approach to anti-discrimination legislation is to provide separate laws dealing with discrimination on specific grounds.³¹⁶ The SDA deals with discrimination on the grounds of sex, marital status and pregnancy and with sexual harassment and for some purposes with discrimination on the ground of family responsibility. The RDA deals with discrimination on the grounds of race, colour and national or ethnic origin. The DDA deals with discrimination on the ground of disability.³¹⁷ This approach provides a strong focus for each of the areas of discriminatory behaviour. It derives in part from the fact that the legislation was enacted at different times and implements different international instruments.³¹⁸ It does not provide for the case where a person discriminates on more than one of these grounds at any given time. This separate structure also assumes that women and men only ever experience discriminatory behaviour in separate categories.³¹⁹ Putting discrimination into separate boxes causes problems for those with characteristics covered by different Acts as they may fit a number of boxes simultaneously. Women may experience 'multiple oppressions simultaneously' for example, 'sexual harassment or rape cases [may be] "complicated" by issues of racism [and] will demand different descriptions of women's sexuality and men's abuse of it'.³²⁰ Is the Aboriginal woman who experiences discrimination to be characterised by her gender and therefore proceed under the SDA or by her race and therefore under the RDA? Either way it will be inadequate because she experiences discrimination because she is an Aboriginal woman.

The intersection of race and sex provides a more complex and different range of experiences than a

*white woman or Black man.*³²¹

There is a need to develop an approach that is able to recognise 'the indivisibility and simultaneity' of disadvantages that different women may experience.³²²

3.63 Cases show that multiple discrimination is not recognised. A study in Canada found that it was unusual to find any reference to racial background in sex discrimination cases or to gender in race discrimination cases.³²³ It found that one of the primary reasons for this is the fact that anti-discrimination legislation operates on the basis of a single deviation from what is considered to be the normative experience.³²⁴ For example, in the context of sex discrimination legislation it is the single difference of sex that is considered. This does not allow for the consideration of the particular experience of discrimination that may result from the interaction of sex and ethnicity. In the United States the intersection of race and gender has been raised in discrimination law. However, the courts in the United States have stated either that black women claiming discrimination in their employment had to choose whether the discrimination they suffered was on the ground of race or of sex³²⁵ or that Black women were unable to represent 'women' or 'Blacks'.³²⁶ A recent Australian research paper argued that it is very difficult for women of non-English speaking background to formulate complaints under anti-discrimination legislation because the discrimination they face is systemic. These women are particularly vulnerable to discriminatory behaviour and practices on gender and racial grounds as a consequence of the aggregation of lack of English language skills and position in the labour force.³²⁷ The report states that there is currently 'no adequate mechanism' in which to blend the complaints of race and sex discrimination under federal legislation.³²⁸ It is unable to cater for the complexity of the discrimination experienced by non-English speaking background women.³²⁹ It recommends that 'HREOC investigate ways in which harassment and discrimination against non-English speaking background women can be heard jointly through the Race and Sex Commission'.³³⁰ The report stressed the need for cross-portfolio work between the SDC and the RDC.³³¹ To address the separation of race and sex discrimination complaints the paper recommends a joint investigation 'on [the] experiences of discrimination against NESB women workers', with a particular emphasis on indirect discrimination.³³²

Dealing with difference

3.64 Introduction. The Commission was told

*specific strategies need to be developed in order to address the particular problems suffered by women in multiple disadvantage situations. This is particularly the case as multiple disadvantage will exacerbate any disadvantage already suffered by women in the law.*³³³

There are several steps that can be taken to address multiple discrimination.

3.65 Formulating the complaint. One way of dealing with difference and multiple disadvantage is for cases to be formulated to demonstrate that the experience of sex discrimination can be fundamentally different for different groups of women. Tribunals need to be encouraged to take account of multiple discrimination in an interactive way in their decisions.³³⁴ This is probably easier under State and Territory laws which incorporate many grounds of discrimination under the one Act. However what appears to have happened, in parallel with what has happened in Canada, is that the race, ethnicity or national origin of complainants in sex discrimination cases has largely disappeared in the case law. One exception to this general statement is the Victorian case of *Fares*.³³⁵

A woman from a non-English speaking background made a complaint under the *Equal Opportunity Act 1984* (Vic) that she was treated less favourably, that is, discriminated against, on the ground of her sex and her ethnicity. The complaint concerned the failure to secure a promotion at a Technical and Further Education (TAFE) college and the treatment that was directed towards employees who were women from non-English speaking backgrounds. The Equal Opportunity Board dealt with the

complaint on both grounds of discrimination linked together.

The Board accepted background evidence to the complaint. This provided a cumulative picture of the discrimination experienced by non-English speaking background women at the TAFE and the context for the complaint. In this way the complaint was not treated in isolation but rather the entire environment of the workplace and the experiences of the women were considered relevant to its determination. The Board appreciated that there were particular negative stereotypes applied to non-English speaking background women in that work environment. It commented that the TAFE held

*a belief that NESB women are generally more emotional, highly strung, demanding and overly conscientious in their work, long winded and unable to be concise, holding undue regard for academic qualifications as opposed to practical experience and thus ambitious for themselves.*³³⁶

The Equal Opportunity Board held that the complainant had suffered less favourable treatment as a result of her sex and ethnicity.

3.66 Legislative recognition of multiple discrimination. Multiple discrimination cannot be overcome simply by re-formulating complaints. There is a need for legislative recognition. There are a number of options:³³⁷

- **Option one.** The first option is to replace the existing federal laws with a single comprehensive anti-discrimination Act, similar to the State and Territory Acts. However, the federal Acts reflect the international conventions on which they rely and it is important that this connection be retained. Discrimination against women may be lost in a generic anti-discrimination law. Having a single Act does not necessarily mean that the court or tribunal will take an interactive approach to multiple discrimination.³³⁸ The Commission does not support this option.
- **Option two.** A second option is to allow for different claims to be brought separately under the different Acts. It is already possible to pursue separate complaints under the federal legislation.³³⁹ This option does not provide an integrated approach and is therefore unsatisfactory. It is also artificial as it 'fails to recognise that racism [sexuality, disability and/or socio-economic background] and sexism interact inextricably to harm' women.³⁴⁰ The possibility of pursuing a number of separate complaints may not be a realistic option as it assumes that a complainant will be able to afford the emotional and financial cost.
- **Option three.** A third option is to allow the complainant under each head to be joined and make provision for them to be heard together. This would enable the tribunal or court to comprehend fully the situation of the complainant and the discrimination that a particular woman or group of women has experienced. While this option does not lead to additional remedies it does ensure that the court or tribunal considers the total harm suffered and makes appropriate orders. The joining of complaints should enable the tribunal to assess properly the true loss, damage or injury suffered by the complainant. A provision to this effect could be included in the SDA, and adapted appropriately, should also be inserted in the RDA and the DDA.

3.67 Commission's approach. The Commission favours the approach in option three. The joinder of complaints is the most effective way to require HREOC or the court to consider the entirety of the discrimination experienced by the complainant

Recommendation 3.9

a) The SDA should be amended to provide that, where a complainant formulates her complaint on the basis of different grounds of discrimination covered by the separate federal legislation, then HREOC or the court must consider joining the complaints under the relevant pieces of legislation. In so doing HREOC or the court must consider the interrelation of the complaints

and accord an appropriate remedy if it is substantiated.

b) The provision could read as follows:

If it appears to the tribunal that the facts before it support the conclusion that the complainant has, or may have, suffered discrimination on grounds other than those specified in the SDA, and that those grounds are covered by the *Racial Discrimination Act 1975* (Cth) and/or the *Disability Discrimination Act 1992* (Cth), and the complainant formulates the complaint as an integration of those grounds, then the Commission may consider and determine the complaint and may make orders as if the complaint had been made under each piece of legislation and joined together.

c) A similar provision should be inserted in the *Racial Discrimination Act 1975* (Cth) and the *Disability Discrimination Act 1992* (Cth).

Exemptions

Exemptions limit the coverage of the SDA

3.68 ***The effect of exemptions.*** The SDA contains a number of exemptions which permit discrimination on the ground of sex, marital status or pregnancy and sexual harassment in certain areas.³⁴¹ The inclusion of many of the exemptions was part of the compromise and negotiation process in having the Act passed.³⁴² Their continuance, after ten years of the Act's operation, limits the effectiveness of the SDA.³⁴³ One submission argued:

*the laws prohibiting discrimination are necessary and important, and it is the exemptions to those laws which can impact adversely upon women ie it is the exemptions from the laws that can cause the adverse impact upon women, and not the laws themselves.*³⁴⁴

In effect those areas which enjoy exemptions are not required to take any steps towards reducing and eliminating discrimination against women.

3.69 ***What exemptions are provided.*** The SDA provides for three types of exemptions: permanent statutory exemptions, short term statutory exemptions and temporary exemptions granted by HREOC. The permanent exemptions relate to

- the extent to which the Act binds the Crown³⁴⁵
- the extent to which the Act applies to employment by the States and instrumentalities of the States³⁴⁶
- genuine occupational qualification³⁴⁷
- discrimination against a man in respect of rights or privileges related to pregnancy or child birth³⁴⁸
- services that can only be provided to members of one sex³⁴⁹
- special measures intended to achieve equality³⁵⁰
- accommodation provided to employees or students³⁵¹
- the residential care of children³⁵²
- charities³⁵³
- religious bodies³⁵⁴

- educational institutions established for religious purposes³⁵⁵
- voluntary bodies³⁵⁶
- acts done under statutory authority³⁵⁷
- insurance³⁵⁸
- superannuation³⁵⁹
- sport³⁶⁰
- combat duties and combat-related duties.³⁶¹

3.70 ***Should the exemptions be retained?*** DP 54 sought submissions on whether the exemptions in the SDA should be removed or otherwise amended.³⁶² The Commission received a variety of responses. Most submissions that responded to this question argued for the removal of all exemptions, with the exception of the exemption for special measures.³⁶³ Some submissions, however, expressed concerns about the possible adverse effect on women of a blanket removal.³⁶⁴ One submission was opposed to these suggestions and expressed the opinion that the exemptions should remain in the SDA.³⁶⁵

3.71 ***Arguments for keeping the exemptions.*** There are two principal arguments to retain the exemptions. The first argument holds that it is necessary to permit discrimination in those areas which enjoy exemptions. Educational institutions established for religious purposes argue that they need to discriminate to avoid offence to the tenets and beliefs of the religion. For example, it may be considered that to employ a teacher who is in a de facto relationship may offend religious beliefs. The second argument is quite different. It considers that the blanket removal of exemptions may in fact further disadvantage women. For example, removing the exemption for the *Social Security Act 1991* (Cth) (SSA) may cause hardship because the SSA in some degree recognises and attempts to address women's disadvantaged status.³⁶⁶ This argument stresses the need for careful consideration of the manner in which the exemptions are removed.

3.72 ***Arguments for removing the exemptions.*** In general terms the main arguments in support of the removal of the exemptions³⁶⁷ are that:

- they were included for political expediency at the time of introducing the SDA and it is no longer necessary to retain them
- continuing the exemptions directly contravenes CEDAW
- discrimination should not be formally allowed to continue in any area
- the areas of exemption are some of those which are most pertinent to women
- the removal of the exemptions would send a strong message that discrimination against women is unlawful.

Review of the Permanent Exemptions

3.73 In 1990-92 the SDC conducted a review of certain permanent exemptions:³⁶⁸

s 13: instrumentality of a State

s 38: educational institutions established for religious purposes³⁶⁹

s 39: voluntary bodies

s 40: acts done under statutory authority³⁷⁰

s 42: sport.

In her report the SDC recommended the repeal of s 13, 38, 39 and 42. She also recommended that s 40 be amended to remove the exemption for all future industrial awards and to impose a two year sunset clause for the exemption for current awards, during which time the federal Department of Industrial Relations should investigate discrimination in federal awards, in line with the recommendation in *Half Way to Equal*.³⁷¹ The Government has not yet responded to the report.³⁷² In its submission to the Commission the Attorney-General's Department commented that the recommendations contained in the SDC's report will form part of the third phase of the implementation of *Half Way to Equal*.³⁷³ Submissions to the Commission specifically supported the implementation of this report.³⁷⁴

Exemption of the States and Territories

3.74 Scope of the exemption. The States and Territories and their instrumentalities are exempt from the employment and sexual harassment provisions of the SDA.³⁷⁵ Submissions received by the Commission strongly supported the removal of this exemption.³⁷⁶

3.75 States without anti-discrimination legislation. At present Tasmania is the only State or Territory which does not have anti-discrimination legislation. Submissions commented on the lack of protection for women in Tasmania, particularly those who work for State or local government bodies.³⁷⁷

*The lack of anti-discrimination legislation in Tasmania has meant that a significant number of women in this state have no access to a law under which a complaint can be lodged . . . [this also means that] women from non-English speaking backgrounds are extremely disadvantaged in situations of sexual harassment and exploitation at work.*³⁷⁸

*Women in Tasmania are not covered by state anti-discrimination legislation, and therefore have no avenue for redressing sex discrimination. . . . The advent of state governments with anti-human rights stance makes it imperative that this section be removed.*³⁷⁹

The Tasmanian Government has recently announced its intention to introduce sex discrimination legislation.³⁸⁰

3.76 Different protection is afforded in different States and Territories. Women have different protection against discrimination depending upon the State or Territory in which they reside.³⁸¹ For instance until 1992 there was no anti-discrimination legislation in the Northern Territory. Women there had the protection of the SDA but this exemption for the Territory left those in NT Government employment unprotected. The *Anti-Discrimination Act 1992* (NT) now provides women in the Northern Territory with more adequate protection although perhaps less than that provided by the SDA.³⁸² For example, one submission argues that it is unclear whether the NT Act in fact covers indirect and systemic discrimination. It has no vicarious liability provisions similar to those in the SDA. Women in all parts of Australia should have access to the same levels of protection against discrimination and sexual harassment. The Commission recommends repeal of SDA s 13 to provide the same basic level of protection for the rights of all women whatever State or Territory they inhabit.

Recommendation 3.10

The SDA should be amended to repeal s 13 which exempts the instrumentalities of States and Territories.

Exemption for religious schools

3.77 Scope of the exemption. Educational institutions established for religious purposes are exempt from the SDA in relation to discriminatory actions or policies which are 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' and the person who discriminates does so in 'good faith'.³⁸³ Submissions received by the Commission expressed concern over this exemption and recommended its removal.³⁸⁴ There are similar exemptions in most State and Territory anti-discrimination legislation, although in some instances the provision is worded quite differently.³⁸⁵ The Attorney-General has stated that he will consider the operation of this exemption as part of the third stage of the implementation of *Half Way to Equal* and that the Department is 'sensitive to the conflicting principles exposed with the religious schools exemption, namely, the need for religious liberty versus a right to freedom from discrimination'.³⁸⁶

3.78 Arguments for keeping this exemption. Those supporting this exemption argue that freedom of religion would be infringed by the application of the SDA to religious schools. They refer to the right to freedom of religion in ICCPR which states that a person has a right to adopt and manifest a religion or belief 'in worship, observance, practice and teaching'.³⁸⁷ They argue that the removal of the exemption 'would be an infringement of the right of religious institutions to practise their own religion',³⁸⁸ that parents may choose a particular school because it advances a particular religious creed and that the church would be constrained in advancing its religious beliefs if the exemption were removed.³⁸⁹ They considered it important to be able to choose and rely on teachers that the employer considers advance the morals, beliefs and philosophy of the particular religion.³⁹⁰ One submission to the SDC's review said that the current exemption is so wide and ambiguous that there is doubt as to its effectiveness and that it should be tightened.³⁹¹ The SDC concluded that 'some church groups' considered the exemption 'essential' but that this view is not 'prevalent'.³⁹² The Commission did not receive any submissions on this issue from religious organisations or schools.

3.79 Arguments for removing this exemption. The most comprehensive submission on this issue was received from the Independent Teachers' Federation.³⁹³

*[T]his area of Australian cultural life is significant, and is worthy of being assessed against the objects of the Sex Discrimination Act and the values and provisions of the Convention on the Elimination of All Forms of Discrimination Against Women.*³⁹⁴

The submission suggested that the exemption has a discriminatory impact on women in that women who are in de facto relationships or who become pregnant outside marriage are dismissed from religious schools while men in de facto relationships are not.³⁹⁵ The submission provides examples of discriminatory practices: objection to the living arrangements of teachers, the terms contained in letters of appointment, recruitment procedures and rules about pregnancy. Religious educational institutions are employers of significant numbers of people.³⁹⁶ The submission argued that these employees should not be without the protection of the SDA. It pointed out that there is no control over whether the religious beliefs or tenets on which the discrimination is based are in fact held by the particular religious community at large. It conceded that there needs to be some balance between the teacher's right to privacy and the religious institution's right to provide an environment that accords with the beliefs of the religion. However, the exemption does not strike a balance in that it recognises the employer's right but not the employee's. It concluded that institutions receiving substantial government funding should be required to comply with the SDA, that it will not open a 'Pandora's box' of complaints and that removing the exemption will simply require employers to 'develop and implement fairer employment policies and practices'.³⁹⁷ The submission recommended that the exemption be removed completely or at the very least that it be removed in regard to sex and pregnancy and narrowed in relation to marital status to require reasonableness and objective criteria in its exercise.³⁹⁸ The Affirmative Action Agency noted that religious organisations are interested in the equal opportunity measures they can adopt that are still in accordance with their faith. Furthermore, the exemption for voluntary bodies, including community organisations and non-government schools with over 100 employees, under the AAA has been removed.³⁹⁹

*The development of affirmative action programs in these areas demonstrates that significant problems exist for women and that these issues can be addressed without offending religious beliefs. It highlights the contradiction which the SDA exemptions for these organisations create.*⁴⁰⁰

3.80 **Other recommendations.** *Half Way to Equal* recommended the insertion of a requirement of reasonableness in the exemption contained in SDA s 38.⁴⁰¹ It considered that this would remove any ambiguity in the section and would require the employer to meet the standard of reasonableness and provide for an 'objective assessment of the circumstances'.⁴⁰² The review conducted by the SDC recommended the removal of the exemption 'to ensure the protection against discrimination to all Australians including the large number of teachers employed in the non government school system' and to reflect the government's commitment to implementing Australia's human rights obligations.⁴⁰³ As a 'less desirable' alternative the SDC supported the recommendation of *Half Way to Equal*.⁴⁰⁴

3.81 **The Commission's view.** Religious freedom⁴⁰⁵ and the right to enjoy culture and religion⁴⁰⁶ must be balanced with the right to equality and with the principle of non-discrimination.⁴⁰⁷ The statutory exemption prefers one right over another and precludes any consideration of where the balance between the rights should be. Women employed in religious educational institutions should have the same right to be free from discrimination as other women.⁴⁰⁸ The Commission supports the recommendation of the SDC in her review of the permanent exemptions. The Commission considers that the recommendation made in *Half Way to Equal* would be of limited benefit and endorses it as a second, though less satisfactory, option. If the exemption is to be retained it should apply only to discrimination on the ground of marital status. There can be no religious basis for discrimination on the grounds of sex and pregnancy.

Recommendation 3.11

The exemption contained in SDA s 38 for educational institutions established for religious purposes should be removed. At the very least the exemption should be removed in relation to discrimination on the ground of sex and pregnancy. The exemption for discrimination on the ground of marital status, if it is to be retained, should be amended to require a test of reasonableness.

Social security exemption

3.82 The SDA provides an exemption for the *Social Security Act 1991* (Cth) (SSA). It operates to some degree to the benefit of women and yet it also relies upon and reinforces traditional assumptions about the structure and nature of relationships. This discriminates against women. The Commission received 31 submissions on the SSA

- The SSA contains specific provisions for women, for example, differing age eligibility for the age pension,⁴⁰⁹ the wife's pension,⁴¹⁰ and the Basic Family Payment and the Additional Family Payment which are generally paid to the female member of the couple.⁴¹¹ Submissions argue that these benefits recognise the disadvantages women experience and the responsibilities they assume for the care of children and relatives.⁴¹²
- Some provisions apply stereotypical assumptions about the nature of relationships and this has a discriminatory impact on women. For example, the cohabitation rule which sets out the criteria to determine whether a person is in a 'marriage-like relationship' is based on the assumption that women who are in a heterosexual relationship will be financially supported by their male partner.⁴¹³ This does not reflect reality and reinforces the notion that women are dependent on men. Women represent over 94% of recipients of the Sole Parent Pension.⁴¹⁴ While the cohabitation rule appears to be gender neutral in its application it has a discriminatory impact on women. Submissions also expressed

concern over the manner in which Department of Social Security staff investigate whether a marriage like relationship exists.⁴¹⁵

It is recognised that the SSA is of 'enormous significance to women'.⁴¹⁶ A submission commented that:

*The exemption has far reaching implications given the discrimination inherent in the policies and practices of the DSS [Department of Social Security] and the SSA itself.*⁴¹⁷

3.83 Concern over the removal of the exemption. Some submissions argue that the repeal of the exemption will simply apply formal equality to the SSA which will not necessarily benefit women. They suggest that a repeal without other changes to the SSA may reinforce women's disadvantage in Australian society by preventing access to a source of income.⁴¹⁸

*In any decision for a blanket removal we must ensure in the short term, women are not further disadvantaged and that the removal of the exemption would address the discriminatory effects of the SSA.*⁴¹⁹

It is argued that some of the SSA provisions benefit women as they, to some degree, recognise the historical and current disadvantages women face in the employment market and hence in having an independent source of income.⁴²⁰ In terms of formal equality these provisions discriminate against men, in that they provide a benefit only available to women. The existence of the exemption creates a perception that unfair preference is being given to women.

3.84 The removal must not further disadvantage women. If the exemption were to be repealed the SSA would need to be amended to prevent disadvantage to women.⁴²¹ For example, special assistance may be needed for women in financial need, recognising the disadvantages women experience in access to resources, work, remuneration for work and responsibilities for the care of children and elderly relatives. Any removal of the exemption for the SSA must not jeopardise the right of women to an adequate minimum income.

*In the long term, the removal of the exemption needs to be assessed in terms of its ability to affect significant changes for women. The social security system posits women as economically dependent - either upon men or the state. Women's unpaid work must be acknowledged both for value and as a barrier to the economic independence of paid work. To address the inequities in the social security system requires that we address the broader social issues of the discrimination women experience in economic life.*⁴²²

3.85 Further examination required. This exemption raises complex issues which require more thorough examination than is possible in this reference. The Commission notes that there is a statutory requirement that the Minister review the operation of the exemption before 1 June 1996.⁴²³

Recommendation 3.12

The exemption for the Social Security Act 1991 (Cth) needs to be examined thoroughly. The Commission recommends a further reference on whether the Social Security Act 1991 (Cth) should continue to be exempt from the provisions of the Sex Discrimination Act 1984 (Cth) and whether additional special measures would be required if the exemption was repealed.

Other exemptions

3.86 The review of the permanent exemptions conducted by the SDC also considered the exemptions provide for voluntary bodies,⁴²⁴ acts done under statutory authority⁴²⁵ and sport.⁴²⁶

3.87 ***Voluntary bodies.*** Voluntary bodies are defined by the SDA to be 'an association or other body' that engages in activities for purposes other than making a profit.⁴²⁷ It was considered that enough time has passed since the commencement of the SDA for voluntary bodies to have brought their organisation and structure into line with the provisions of the Act.⁴²⁸ Concern was also expressed about the manner in which this exemption relates to the exemption for sporting activities, as sporting activities may be conducted by voluntary organisations.⁴²⁹ The SDC recommended the removal of the exemption for voluntary bodies.⁴³⁰

3.88 ***Sport.*** The SDC considered that the terms strength, stamina and physique were based on assumptions about the capacity of women and men to participate in sporting activities. They served to create an 'elite male' standard.⁴³¹ The exemption was generally used to prevent women, rather than men, from using facilities and participating in sport. Additionally sporting activities are often organised by voluntary bodies that are also exempt from the SDA. The SDC recommended the removal of the exemption relating to sport.⁴³²

3.89 ***Acts done under statutory authority.*** In considering the exemptions provided for acts done under statutory authority the SDC stated that s 40A which provides for a review of the exemptions in s 40(2) & (3) by 1996, was sufficient. Following that review she expressed the hope that the exemptions will be removed at that time.⁴³³ She considered that the exemption provided in s 40(1) for courts and tribunals is not objectionable if those courts and tribunals are aware of and have regard to anti-discrimination principles.⁴³⁴ The SDC recommended that the removal of the exemption relating to prospective awards and that current awards should be subject to a two year sunset clause. Over the two year period the Pay Equity Unit of the Department of Industrial Relations could investigate discrimination in federal awards and the impact on women of removing the exemption, as recommended in *Half Way to Equal*.⁴³⁵

Recommendation 3.13

The exemptions in the SDA for voluntary bodies and sport should be repealed as recommended by the Sex Discrimination Commissioner *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*.

Complaint handling

Assisting complainants

3.90 Certain groups of women experience difficulties in making complaints under the SDA.⁴³⁶ A review of the complaint handling process has been commissioned by the SDC, RDC and the DDC and is being conducted by the Public Interest Advocacy Centre.⁴³⁷ The low level of use of the SDA by Aboriginal and Torres Strait Islander women, women of non-English speaking background and women with disabilities has already been noted.⁴³⁸ The requirement that a complaint be in writing may 'be an unsuitable mechanism for many potential complainants'.⁴³⁹ The Office of the Status of Women argued that many women need assistance to lodge complaints under the SDA. It recommended that specialist discrimination law centres be established.⁴⁴⁰ The DDA provides that a woman with a disability bringing a complaint of discrimination on the ground of disability can be assisted by HREOC to formulate her complaint.

If it appears to the Commission that:

- a) a person wishes to make a complaint under sub-section (1); and
- b) that person requires assistance to formulate the complaint or to reduce it to writing;

it is the duty of the Commission to take reasonable steps to provide appropriate assistance to that person.⁴⁴¹

Without a similar provision the SDC would remain vulnerable to the argument that unfair assistance was given to a complainant without the risk of arguments on natural justice grounds.⁴⁴² A provision similar to that contained in the DDA should be included in the SDA.⁴⁴³

Recommendation 3.14

The SDA should provide, along the lines of the *Disability Discrimination Act 1992* (Cth) s 69(2), that HREOC should give appropriate assistance to a person who wishes to make a complaint under the SDA in the formulation of the complaint and in reducing the complaint to writing.

The conciliation process

3.91 ***Preference for conciliation.*** Many submissions to the Commission discussed the advantages and disadvantages of conciliation for complaints of sex discrimination.⁴⁴⁴ Recognising the difficulties women have in accessing justice,⁴⁴⁵ they may have a preference for the cheaper, less intimidating, speedier procedure offered by conciliation.

*Generally, women . . . prefer to pursue a private settlement...If a matter goes to hearing, the woman may face a series of (often unacceptable) pressures.*⁴⁴⁶

3.92 ***Concerns with conciliation.*** In conciliation there will often be a power imbalance between the parties, 'reflecting the subordinate position of women in society'.⁴⁴⁷ Private conciliation and settlement also lacks the educative value of public determinations in letting the community know what the law is, informing potential complainants about the process, providing knowledge about precedents and giving a necessary context for conciliation.⁴⁴⁸ A submission suggested that the fact that sex discrimination matters are considered to be open to negotiation and conciliation implies that sex discrimination is not considered wrong but is a matter of misunderstanding between the parties.⁴⁴⁹ It was also suggested that the process serves to individualise complaints rather than focus on the discrimination which may infect the workplace.⁴⁵⁰ One submission argued that the confidentiality of conciliation isolates women and further disempowers them.⁴⁵¹ Conciliation is resource intensive and time consuming and many complainants withdraw.⁴⁵²

3.93 ***'Successful' conciliation?*** The HREOC Annual Reports refer to complaints being 'successfully' conciliated. Success is measured by whether a settlement was reached, not by whether it was satisfactory to the complainant or the respondent or the SDC or whether it was in accordance with the Act.⁴⁵³ The Commission's concern is that the success of the legislation as a whole needs to take into account its effect on community attitudes and the acceptance of the principle of equality and non-discrimination. Conciliated settlements may limit the Act in achieving its goals in terms of education, publicity and change of community attitudes because the outcomes are unknown beyond the parties involved.

3.94 ***A balance.*** A balance needs to be found between the benefits and disadvantages of the conciliation process. Women appear to prefer to use conciliation.⁴⁵⁴ One way to retain conciliation while increasing public knowledge about the resolution of conciliated complaints is to place them on a public record. A public record could have a positive influence in increasing knowledge and awareness of the provisions of the SDA. The record should provide statistics and information on the nature of the complaint and of the settlement. Confidentiality could be assured by withholding the names of the parties and any identifying information. The Commission recommends that the SDA be amended to provide this.

Recommendation 3.15

The SDA should be amended to require the SDC to publish, or otherwise make available, a public register of settlements reached in conciliation. This could be done through a public report

or through HREOC's annual report to parliament. No names or identifying information concerning the parties should be included in the public record.

Repeat respondents

3.95 ***Problem with SDA.*** Submissions to the Commission highlighted another concern arising from the confidentiality of the conciliation process. A repeat respondent⁴⁵⁵ could be the respondent to a number of successive complaints but by settling them could avoid the embarrassment of public exposure and the motivation to change the behaviour and/or the environment which gave rise to the discrimination.⁴⁵⁶ The fact that a respondent reappears indicates that it has significant problems.⁴⁵⁷

3.96 ***How should repeat respondents be dealt with?*** The SDC can deal with a respondent under the SDA only on the basis of an individual complaint. This may not be sufficient, however, to deal effectively with repeat respondents.

*[T]here is no way under the SDA that issues relating to recidivist respondents can be considered and/or dealt with by the SDC.*⁴⁵⁸

There is a need for extra mechanisms to deal with repeat respondents.⁴⁵⁹ The SDC has commented that there should be stronger enforcement powers which require a repeat respondent to change the environment of the organisation to eliminate discrimination.⁴⁶⁰

3.97 ***Discretion to refer a matter directly to hearing.*** Under the SDA the SDC has discretion to refer a complaint straight to hearing without attempting conciliation.⁴⁶¹ Therefore in a matter involving a repeat respondent the SDC could exercise her discretion and refer the complaint directly to hearing. This could, however, deny the complainant a role in determining the manner in which she would like the complaint to be resolved. It is important for the complainant to control the complaint as she desires.⁴⁶² It is also important for the SDC to have flexibility in the procedure for handling complaints. The SDA should enable the SDC to identify repeat discriminators and, in consultation with a complainant, refer a fresh complaint against a repeat discriminator straight to hearing. The seriousness of the discrimination and the number of occasions in which the respondent has infringed the provisions of the SDA will be important to the SDC in exercising this discretion to refer a matter directly to a hearing.⁴⁶³ The SDA already enables HREOC to recommend financial assistance for a complainant in respect of expenses incurred in connection to the inquiry into the complaint.⁴⁶⁴ This should be used to support complainants unable to afford the cost of a hearing.

3.98 ***Penalising repeat respondents.*** Submissions urged that the SDA provide for higher damages to be awarded against respondents for repeated breaches of the Act.⁴⁶⁵ It was also submitted that criminal prosecution of repeat discriminators should be considered.⁴⁶⁶ The Commission makes no recommendation on these points.

3.99 ***Links with the Affirmative Action Agency.*** Better links between the SDC and the Affirmative Action Agency would make it easier to identify and deal with repeat respondents. Increasing and strengthening these links could also assist in identifying and combating systemic discrimination.⁴⁶⁷ The Affirmative Action Agency stated in its submission to the Commission that 'there is much to be gained from developing a closer working relationships between the two organisations'.⁴⁶⁸ While the Commission makes no specific recommendation on this point, an option would be to require a repeat respondent to institute affirmative action measures and to report on this in its next report to the Affirmative Action Agency as part of the resolution of a complaint under the SDA.

Recommendation 3.16

a) The SDA should provide that the SDC may refer a matter directly to hearing where the

respondent is a repeat discriminator. In considering whether to exercise this discretion to refer the matter to a hearing, the SDC must take into account:

i) the wishes of the complainant, and

ii) the nature and frequency of the repeat respondents violations of the SDA.

b) If a matter is referred to hearing and the complainant is unable to afford the costs involved then HREOC should recommend to the Minister under 83(1) that assistance be provided to the complainant for expenses incurred in connection with the hearing.

Damages

3.100 ***Awards under the SDA are small.*** DP 54 expressed concern about the low level of monetary awards made under the SDA and suggested that this may reflect a view that discrimination against women is not important.⁴⁶⁹ Submissions supported the view that the 'punishments inflicted are inappropriate and trivial'.⁴⁷⁰

*The perception . . . is that the amount of money that women are awarded as compensation through the sex discrimination/equal opportunity system is frequently petty and trivial and not sufficiently related to what has occurred and its impact.*⁴⁷¹

3.101 ***Damages play a role in educating the community.*** Submissions also commented on the role appropriate awards of damages would play in educating the community that discrimination against women is wrong. A submission commented that more appropriate damages need to be awarded to demonstrate that discrimination is a 'serious matter, and will not be tolerated'.⁴⁷²

3.102 ***Valuing harms that result from discrimination.*** It was suggested that one of the reasons for small awards is the difficulty tribunal members and the judiciary have in appreciating the harm suffered when it is not physical and therefore not visible.

*It seems that one of the reasons why awards in these cases are comparatively low is that in most cases the complainant suffers from injury to feeling or psychiatric injury and does not suffer any actual physical injury. It is generally the case that courts and tribunals are more willing to make substantial awards of compensation where there is a physical injury.*⁴⁷³

The tribunal members and the judiciary may have difficulty in appreciating and hence valuing the harms suffered by women in sex discrimination cases, particularly when they involve sexual harassment. One submission proposed that common law awards be used as the basis for awards under the SDA.

*Courts and Tribunals should be using common law awards as guidelines for compensation in sex discrimination cases. The present very low level of damages discourages a woman from pursuing a meritorious complaint through the hearing when the negative factors of publicity, litigation stress and low level of damages and high legal costs are weighed up. We also note that the recent case in Tasmania, where a young woman used common law to deal with sexual harassment in her workplace, has aroused much resentment from complainants about the low level of damages available in the discrimination jurisdiction.*⁴⁷⁴

3.103 ***Statutory guidance to make damages more appropriate.*** It would be useful to provide the courts and tribunals with statutory guidance on the appropriate level of awards in sex discrimination cases. One

submission recommended that the SDA contain guidelines for awards relating to loss of earnings or employment, personal injury, distress, costs and the time taken to obtain a hearing.⁴⁷⁵ Another recommended the model of recent amendments to the *Wrongs Act 1936* (SA).⁴⁷⁶ This scheme was introduced to reduce the amounts that were being awarded. The submission contends that it could have the effect of increasing awards in discrimination matters. Although awards have been small, the range of measures that may be considered in a determination under the SDA is very broad and nonexclusive.⁴⁷⁷ This suggests that tribunals and courts have failed to use their powers creatively.⁴⁷⁸ Damages are considered to be compensatory not punitive.⁴⁷⁹ The introduction of statutory guidelines would encourage the HREOC or court to explain more fully the reasons for making a particular award.

3.104 ***Settlements reached in conciliation.*** It has also been suggested that settlements reached in conciliation offer greater flexibility and may allow for awards that are higher than those available in a hearing.⁴⁸⁰ Settlements reached through conciliation include monetary compensation for loss or damage, an apology, a reference from the employer, re-employment, promotion, an undertaking by the respondent not to engage in discriminatory practices and workplace training.⁴⁸¹ Establishing a public record of settlements reached in conciliation is a way to influence the current level of damages awarded by tribunals.⁴⁸² The SDC is examining the level of damages awards in her complaints handling review.⁴⁸³

Recommendation 3.17

In making awards of damages for discrimination the HREOC and the Federal Court should have regard to awards made at common law or under statute as compensation for loss, injury or damage of a comparable nature (and shall specify these factors in reasons).

PART III - ACCESS TO JUSTICE

4. Access to justice: legal aid

Introduction

Women lack access to justice

4.1 The Commission's Interim Report ALRC 67 discussed evidence it received that many women in Australia are unable to obtain fair and equal access to justice in a number of ways and on many levels. The majority of women who made submissions believed that the system had failed them. They claimed that they were unable to obtain adequate legal information, accurate advice or proper representation or that the law itself was ill-fitted to their needs. They felt that the process either gave their experiences no credibility or appeared to exclude them. The problem is twofold. It involves a lack of necessary legal services and, more intangibly, a lack of credibility within the legal system. This part of the report deals with the question of legal services.

Interim Report

4.2 The Interim Report recommended that a National Women's Justice Program (NWJP) be established as an urgent response to the problems of access to justice on a national level. The report proposed a series of measures to form part of the NWJP and made some final and some provisional recommendations.⁴⁸⁴ Since that time the Access to Justice Advisory Committee (AJAC) has reported. After further consultations the Commission now makes final recommendations.

Final report

4.3 This chapter focuses on the availability of legal representation and ways to address the gender imbalance in service provision. Given the increasing cost of litigation there are other ways of assisting women at lower cost that need to be considered. These are also discussed in this chapter. The next chapter presents other activities which are effective ways of providing services for women through legal aid funding. These include

- women's legal centres
- court support schemes
- telephone advice
- community education and training.

Chapters 6 and 7 deal with other practical ways in which the courts and service providers can make the legal process better meet the needs and experiences of women. All of these matters are related. They all are ways to assist women, especially women who are unable to afford private lawyers and counsellors, to deal with the range of problems that beset them when they attempt to deal with the law.

Legal aid system

Introduction

4.4 Legal aid services were established to assist those who required access to legal services but could not afford to pay for them. The Australian Legal Aid Office (ALAO) was established by the Commonwealth in 1973, and given statutory recognition in the *Family Law Act 1975*. Now Legal Aid Commissions (LACs) in each State and Territory provide services such as duty lawyers, community legal education, mediation and advice. In the Interim Report the Commission argued that there is a gender imbalance in the distribution of legal aid, and suggested various ways to redress this imbalance.⁴⁸⁵ This chapter describes this in more detail, drawing on submissions made to the Commission, and makes a number of recommendations. The chapter

deals with litigation assistance. This is the service on which most legal aid money is spent.⁴⁸⁶ Litigation is the way cases come before the courts and become part of established case law. While some litigation work is carried out by in-house lawyers who are employees of LACs, most is referred to the private legal profession and community legal centres.⁴⁸⁷ In the final part of the chapter services provided by LACs other than litigation assistance are discussed.

Legal aid commissions

4.5 Status. Legal Aid Commissions have been established in each State or Territory by Acts of Parliament. These Commissions are not departments or agencies of governments. They are independent statutory bodies. The Commonwealth has made Agreements for the Provision of Legal Aid with each State and Territory. The Agreements do not specify priorities or establish specific standards. However, they do require the Commonwealth and State and Territory Governments to consider and approve the programs and budgets of the LACs. This enables the Governments to establish broad policy parameters for the distribution of legal aid funds.

4.6 Funding legal aid. The Commonwealth derives its power to fund legal aid from s 81 (the appropriations power) of the Constitution and other legislative powers, such as those covering marriage and divorce. It only provides legal aid funding for matters involving federal law, such as family law, and for matters involving persons for whom the Commonwealth has a particular responsibility, such as migrants and Aborigines.⁴⁸⁸ However the Commonwealth-State Agreements require the Commonwealth to provide the majority of funding overall (55%).⁴⁸⁹ In 1992-93 this proportion was two-thirds (66.2%).⁴⁹⁰ However, in the same year, only 19% of LAC matters concerned federal issues.⁴⁹¹ Originally legal aid money was allocated in accordance with Commonwealth-State Agreements which distinguished between Commonwealth and State matters. The agreements provided that the amount of federal funding was to be related generally to the amount of work on federal matters performed by the Commission. However, since the mid 1980s the Commonwealth State Agreements were renegotiated, and the references to particular Commonwealth matters and persons in which the Commonwealth had an interest were removed.⁴⁹² There is now no implied restriction in the Agreements to require a certain proportion of funding to be allocated for federally relevant matters.

4.7 Legal aid priorities. The Commonwealth *National Principles of Legal Aid* outlines the general priorities for legal aid assistance.⁴⁹³ The Commonwealth has occasionally used its powers under the Agreements with each State and Territory to ensure that legal aid is allocated to specific types of cases.⁴⁹⁴ However, the Commonwealth has largely left the setting of specific priorities for the granting of aid to the LACs, as allowed for in the legislation covering each State or Territory.⁴⁹⁵ A minority of States and Territories have adopted formal sets of specific priorities in their legislation. In addition, all LACs have developed guidelines on the circumstances in which to grant aid, for example, the specific type of cases to be granted assistance and how the means and merit tests are to be applied.⁴⁹⁶ These guidelines provide the most detailed policy statements about how legal aid funding is to be distributed.

Who gets legal aid?

4.8 Fewer people getting aid. In recent years, fewer people have been able to obtain legal aid. This is due in part to the escalation of the cost of providing legal services. At the same time there have been significant increases in the level of demand for free or subsidised legal services due to a number of factors: the recession, an increasing amount of legislation, population growth and an escalation of crime.⁴⁹⁷ Despite this, spending on legal aid has not increased in real terms.⁴⁹⁸ Therefore legal aid has been targeted increasingly towards those needs which are considered to be priorities and eligibility criteria have become increasingly restrictive.

4.9 Women's access to legal aid. Superficially, granting legal aid appears to be gender-neutral in that legal aid guidelines make no reference to the sex of the applicant. One submission said that, when faced with allegations of gender bias, the response of one Legal Aid Commission was

to appoint a few more token women to the Committee that is responsible for formulating the guidelines, and to scour the written guidelines for any mention of the words "female", "woman" or

*"pregnant", which of course produce the standard response, that, no we don't discriminate against women.*⁴⁹⁹

However, gender-neutral guidelines do not necessarily ensure that women have equal access to legal aid.⁵⁰⁰ The evidence suggests that there is gender bias in the allocation of legal aid in practice, and that this constitutes systemic discrimination against women.

4.10 Australian study of gender and legal aid. In 1994 Legal Aid and Family Services (LAFS), a division of the federal Attorney-General's Department, released a report examining the distribution of litigation legal aid (both in-house and referred work) for the whole of Australia in 1990-91 and 1992-3 by gender.⁵⁰¹ The study was undertaken because of community concern over apparent gender disparities in the distribution of legal aid. This had been reinforced by letters to the department from members of the public.⁵⁰² The study revealed that women currently receive a much smaller share of the legal aid dollar than men do. Women were less likely than men to apply for aid: only 39.5% of applications for aid in 1992-93 were from women.⁵⁰³ When they did, they were less likely than men to be successful.⁵⁰⁴ Overall in 1990-91 women received only 35.9% of legal aid funding.⁵⁰⁵ The situation had not improved by 1992-93. In 1992-3 men received 63% of net legal aid expenditure of \$133.9 million, while women received only 37%, \$34.8 million less than men.⁵⁰⁶ In the July-September quarter of 1993, 69% of the total number of legal aid grants went to men, and only 31% went to women.⁵⁰⁷ If legal aid was allocated solely on the basis of relative poverty, it could be expected that more women would receive it than men, given their inferior economic status. In fact, applications by men and women generally fall into different categories. The LAFS study found that there was no gender bias in the sense of directly favouring male over female applicants for aid. Nonetheless it concluded that

... the gender bias found in litigation legal aid is a product of the distribution of aid which strongly favours applicants in criminal matters and that this distribution is a function of a lack of a policy to promote gender equity. The current and stated policies appear to exacerbate rather than cause the gender bias.⁵⁰⁸

The report further concluded that the distribution of legal aid is a form of indirect discrimination against women.⁵⁰⁹

Legal aid and criminal matters

4.11 Majority of successful applications for criminal matters. Most applications and approvals for legal aid concern criminal matters.⁵¹⁰ Although men and women are equally likely to be granted aid when they apply for assistance in a criminal case, most criminal defendants are men and most applicants for legal aid in criminal matters are men. The LAFS study found that in 1992-93 over 80% of the 'criminal' applications were made by men. Women, on the other hand, constituted the majority of applicants in family law matters (almost 70% in 1992-93). There was a small overall imbalance⁵¹¹ in favour of women in grants of aid for family law matters in three LACs in 1992-93 compared to 7 in 1990-91.⁵¹² It was suggested that women are more likely to satisfy the means test since on average they have less income than men.⁵¹³

4.12 Priority for criminal law matters. Legal Aid Commission policy guidelines tend to give priority to criminal matters in which the applicant is potentially threatened with loss of liberty. In some States and Territories the general merits test is waived in these cases. Applications in criminal matters are more likely to be approved than applications in other types of cases.⁵¹⁴ Since 1990 the proportion of net expenditure on criminal matters has steadily increased; on family matters it has remained stable and on civil matters it has fallen.⁵¹⁵

The profile of the typical applicant [for legal aid] four years ago was a single mother with two children living in rented accommodation. The current profile is a 19-year-old male with numerous convictions coming back on yet another charge.⁵¹⁶

LACs have a strong culture which sees criminal work as the major priority. The Commission was told of the view that 'access to justice is access to *criminal* justice'.⁵¹⁷ Because of the priority given to criminal matters, most legal aid funding is now for matters under State and Territory law rather than for matters under federal law. Nonetheless, most of the funding is provided by the Commonwealth.

4.13 **Limitations of the LAFS study.** The LAFS study has two limitations. It only examined applications for and grants of litigation legal aid. It did not inquire into how many people are deterred from even applying for aid.⁵¹⁸ Although there is a general community awareness that legal aid funding goes primarily to criminal matters, it is not known whether women are disproportionately represented among those who do not even make an application. As lawyers and community organisations become aware of cuts to services and eligibility by LACs they become reluctant to refer people for assistance as they are likely to be rejected under the more stringent guidelines.⁵¹⁹ The LAFS study only included litigation legal aid work referred out to private solicitors, since LACs do not cost their inhouse work. It is not known whether the inclusion of in-house work would alter the gender distribution of legal aid funding. The LAFS report argued that 'it is likely that the true bias in resource usage towards men is understated'.⁵²⁰

4.14 **The Dietrich decision.** In 1992 the High Court held in *Dietrich v R*⁵²¹ that an accused person has a fundamental right to a fair trial and that, other than in exceptional circumstances, if an indigent person faces trial on a serious criminal charge and is unrepresented due to no fault of his or her own, the trial should be adjourned or stayed until legal representation is available. The Court said

[N]o argument was put to the court that recognition of such a right for the provision of counsel at public expense would impose an unsustainable financial burden on government. In these circumstances, we should proceed on the footing that if a trial judge were to grant an adjournment to an unrepresented accused on the ground that the accused's trial is likely to be unfair without representation, **that approach is not likely to impose a substantial financial burden on government and it may require no more than a re-ordering of the priorities according to which legal aid funds are presently allocated.**⁵²²

The High Court discussed extensively the basis for considering representation in serious criminal matters as essential for a fair trial. This discussion made no reference to the fact that overwhelmingly men commit more crimes (including serious crimes) than women. It did not consider other areas of law in which legal aid might be provided.⁵²³ No one put the case that women might be disadvantaged by the decision. Given the finite resources available for legal aid, an intervener on behalf of women may have made a significant difference to the decision, or the way in which the reasons for the decision were framed.

4.15 **The effect of the Dietrich decision.** No data is available as to whether the *Dietrich* decision has increased the priority given to criminal matters. However, the decision clearly endorses the priority for criminal matters and may even exacerbate it. In some States LACs have already been forced on several occasions to fund criminal matters as a result of the decision. In Victoria the *Crimes Act* 1958 has been amended in response to *Dietrich*, to provide that a court can order the LAC of Victoria to provide assistance to an indigent accused person if it is satisfied before or during a trial that it will not be able to ensure that the accused will receive a fair trial without legal representation and that the accused person is unable to afford the full cost of legal representation from a private solicitor.⁵²⁴ This section applies despite anything laid down in the Victorian *Legal Aid Commission Act* 1978.⁵²⁵ The *Dietrich* decision may also make it difficult to change legal aid priorities. The Directors of the LACs of Australia told the Commission that since the *Dietrich* case 'it is more difficult to contemplate channelling resources from criminal law to civil and family law'.⁵²⁶

When should legal aid be provided?

4.16 **Submissions.** Many submissions from individual women and organisations complain about the difficulty of obtaining legal aid in matters important to women, particularly family and civil law matters.⁵²⁷ [44](#) In many of these cases the consequences were severe and long-lasting. Some women pursue their legal claims with whatever funds they can find but suffer considerable personal and financial hardship. Others are deterred from seeking assistance from the legal system and simply forfeit any potential legal claim they have or settle on less favourable terms.

*One woman who left her violent husband said that because she was denied legal aid, she was unable to pursue a property settlement after her divorce. She received the washing machine, dryer, computer and printer and \$1000 in cash. Her husband, a respected businessman, was granted custody of the children and retained two matrimonial homes (both still subject to mortgage), a factory and plant, two companies, and a lease on an overseas island.*⁵²⁸

A Tasmanian barrister submitted that in her experience many women who do not receive legal aid agree to less acceptable settlements because they are funding their family law proceedings from the settlement and are concerned to retain as much of the money as possible to house and keep themselves and their children.⁵²⁹ Other submissions described how legal aid had been granted for the original proceedings but refused when women needed to enforce the court's order or take proceedings for contempt of court, for example, when their husband abducted the children while they were on an access visit.

4.17 *Civil and family law matters.* Civil and family law matters raise important issues for women. While criminal matters must receive legal aid funds, areas of law which are more likely to involve women are short changed. These areas include family law and certain civil actions, such as sex discrimination,⁵³⁰ claims for criminal injuries compensation and applications for restraining orders. The federal Sex Discrimination Commissioner recently suggested that funding cuts to the family and civil law areas could be challenged under sex discrimination laws.⁵³¹ The Family Court has also expressed its concern at the cutbacks in legal aid for family law proceedings:

Despite increased Commonwealth funding for legal aid, recent years have seen a sharp contraction in legal aid for family law matters and a substantial increase in legal aid for criminal matters. While we recognise the conflicting pressures on legal aid authorities, we think that the time has come to call into question the continued diminution of aid to parties in family law matters.⁵³²

In a 1994 custody case in which the female applicant had been denied legal aid, the Family Court said:

Issues concerning the welfare of children are no less important in a civilised legal system than issues concerning liberty of the subject. Provision of proper legal representation in matters concerning liberty of the subject has been seen by the High Court of Australia to be essential to the administration of justice (*Dietrich v R* (1993) 67 ALJR 1). The provision of appropriate legal assistance in children's custody cases is equally as vital for citation.⁵³³

The consequences of criminal trial - the risk of imprisonment and its consequent social and economic costs - are clearly very serious. However, other cases also have serious consequences. Matrimonial property and custody matters can have economic and social costs: loss of a home and possessions, poverty and loss of custody of children. These consequences have been described as 'an unacceptable sentence for someone who has not been charged or convicted of any crime, but is a victim of separation and divorce'.⁵³⁴ There is also evidence that a woman without legal representation is less likely to have a protection order granted, leaving her exposed to the risk of further physical and emotional harm.⁵³⁵ A sole parent pensioner who loses her pension, for instance, may not lose her physical liberty, but she will lose her independent income and the means of feeding and caring for herself and her children. As Mossman points out, decisions about the categories of entitlement to legal aid are in essence political decisions:

What are the unstated values in a scheme which always regards the consequences of possible imprisonment as more significant than the loss of custody of one's children, a distinction which could result in an accused person receiving legal aid in criminal proceedings while a mother is denied legal aid in a custody matter?⁵³⁶

4.18 *Human rights obligations.* Criminal matters and family and civil matters all involve human rights recognised in international human rights instruments ratified by Australia. For example, the ICCPR states that a person charged with a criminal offence shall have the right to be presumed innocent until proven guilty and that an accused person has the right to free legal assistance in any case where the interests of justice require it and where he or she does not have sufficient means to pay for it.⁵³⁷ The same Covenant requires governments to take appropriate steps to ensure equality before the law, and equality of rights and responsibilities of spouses upon the dissolution of marriage and to ensure the necessary protection of children on marriage breakdown.⁵³⁸ By failing to provide adequate levels of legal assistance in the family and civil law areas, decisions by State and Territory LACs could contribute to a violation of these obligations.

4.19 *Inequality of resources.* Another argument for giving priority to criminal matters is that the state, which prosecutes crime, has resources which an accused person can never equal. However, the state can be the other party in non-criminal proceedings also, for example, in social security disputes or refugee claims. There can also be marked inequality of resources between the parties in many family law matters. On marriage breakdown women usually retain custody of the children and provide primary or sole care for them; they are also more likely to have no or less independent financial resources than their male partners and

considerably less earning potential.⁵³⁹ Therefore in practice there is likely to be a significant disparity in resources available, in favour of the male partner.

4.20 Protection orders.⁵⁴⁰ Submissions drew attention to the problems faced by women in obtaining legal aid for protection orders.⁵⁴¹ In some States and Territories specialist community advocacy centres have been set up to deal with the needs of women in domestic violence. At a recent conference on domestic violence it was reported that occasionally refusals of legal aid have contributed significantly to women returning to abusive relationships. Women were also said to have had to represent themselves, and consequently they were forced to deal directly with either the abuser or his solicitor.⁵⁴² In some States LACs require the complainant in a domestic violence case to request the police to bring proceedings. However, this makes obtaining orders more dependent on the actions of the police.⁵⁴³ Many women may be reluctant to report the matter to the police due to mistrust or previous negative experiences when they have tried to obtain police assistance. The police may also decline to bring an application for an order, and even if they do the woman may be without protection for some time while the police conduct their investigation and decide whether to take any action.⁵⁴⁴ It is also often impossible to obtain legal aid for criminal injuries compensation claims, leaving the victim of domestic violence doubly disadvantaged. Therefore in practice LACs can end up providing more assistance to the perpetrators of crime than to the victims.

4.21 Women unable to afford private lawyers. The limited availability of legal aid in family law is more likely to disadvantage women more than men because of their lower average incomes. Women may be ineligible for legal aid but unable to afford the services of a private solicitor, unlike men with greater financial resources.⁵⁴⁵ Legal rights have little meaning for those who cannot afford to enforce them. Women who remain in the matrimonial home after divorce, intending to buy their husband's share, are ineligible for legal aid in most States and Territories. They may end up having to sell the home simply to pay the legal fees.⁵⁴⁶ They may then find themselves with insufficient funds to rehouse themselves and have to move into public housing.

*My daughter has been persecuted and financially ruined by the cost of court and fees for lawyers and barristers. When she sold her house she was cut off from legal aid. Now all her money is gone. Her present lawyer is trying to get legal aid restored, but there seems little hope, so my daughter will have to go back to court without legal representation. What chances does she have of saving her child on her own against a very aggressive lawyer and an uncaring judge and a man whose one aim in life is to break the mother and put the child through it.*⁵⁴⁷

Legal aid may also be unavailable for family law property disputes where the amount in contention is less than \$5000. This varies from State to State. Many women are involved in property disputes where the value is less than that, and consequently they will not have assistance in pursuing their rights. This particularly disadvantages Aboriginal and Torres Strait Islander women because of their relative poverty.

A variety of responses

4.22 There have been various responses to these problems. In November 1993 the Board of the Victorian Legal Aid Commission resolved to increase the number of family and civil law grants by 2000 and 1000 respectively. No changes were made to the budget for criminal law grants.⁵⁴⁸ In September 1993 the Queensland LAC established three specialised units in areas regarded as priorities: victims of domestic violence, discrimination and criminal injury. By the end of January 1994 there had been a large number of inquiries and requests for aid in these areas.⁵⁴⁹ These units are staffed by only one solicitor and two para-legals.⁵⁵⁰ The cost of litigation assistance is leading to other innovations some of which will assist women. A National Family Law Strategy Group was established by LAFS in 1993, with representatives from the Commonwealth and the States and Territories. Among other things, the Group is to make recommendations on the types of cases for which legal aid should be available and the level of service to be provided in key areas such as custody and access. Structures such as these may make it easier to earmark funds specifically for family law matters, and to achieve uniformity in legal aid guidelines between States and Territories.

Alternative Dispute Resolution⁵⁵¹ and legal aid

ADR as part of or as precondition to a grant of aid

4.23 In recent years LACs have increasingly required applicants for legal aid to participate in alternative dispute resolution (ADR), such as mediation and conferencing, as a condition of a grant of aid or as a precondition of further grants in family law matters. For example, the Commission was told that in Victoria legal aid is rarely granted to women in family law matters unless they have attended court counselling.⁵⁵² The Queensland LAC also funds mediation or conferencing as the first stage of a grant of aid in family law cases except where there has been domestic violence,⁵⁵³ and those who do not participate are ineligible for further assistance. While the increasing use of ADR by LACs has been regarded as a very positive step by some, there have been some concerns about the trend raised in the literature and in submissions to the Commission.

Violence and ADR

4.24 ADR is based on the assumption that there are two parties of equal bargaining power. In cases where there has been a history of domestic violence, this assumption is inappropriate since violence results in 'an extreme power imbalance between the parties'.⁵⁵⁴ There has been some recognition of this by LACs, in guidelines providing that domestic violence may make it inappropriate to insist on ADR. For example, in NSW the LAC policy is that cases involving a current history of domestic violence or allegations of child abuse or neglect are not to be referred for mediation and are only to be referred for conferencing after careful consideration to ensure that cases involving violence are screened out. Nonetheless, effective assessment is necessary. Even with proper safeguards and skilled assistance it can be very difficult to assess whether there has been violence in a relationship and the subjective impact of this on the victim.⁵⁵⁵ Therefore the violence may remain hidden or minimised. Further, even where the violence is acknowledged, there may still be discretion in applying the domestic violence guidelines to require a woman to take part in ADR. The Domestic Violence Unit in the NSW Ministry for the Status and Advancement of Women has reported concerns from community organisations about the use of conferencing by the LAC in family law matters involving domestic violence.⁵⁵⁶ There is also much anecdotal evidence that in Queensland conferencing is being used in inappropriate circumstances.⁵⁵⁷

Gender and ADR

4.25 On one view ADR may *never* be appropriate in family law matters.⁵⁵⁸ Some argue that women are usually in a less powerful position than their male partners, even where there has been no physical violence. There can be more subtle reasons why women might have unequal bargaining power, such as lack of personal confidence or unequal financial resources.⁵⁵⁹ Because of this imbalance some women may unwillingly enter compromise agreements which do not reflect their true legal entitlements.⁵⁶⁰ Proper safeguards are therefore essential in all cases. LACs should provide thorough screening of all cases to ensure that ADR is not required where there is a current or past history of domestic violence. All ADR sessions should include two thoroughly trained people: a lawyer and a non-lawyer, a woman and a man.

Court guidelines

4.26 The mediation system used by the Family Court provides a model of good mediation procedures. The Court has recognised the special problems of power imbalance where violence or the potential for violence exists. Its guidelines for mediation provide that mediation will normally be regarded as inappropriate in cases of violence. They provide screening procedures to ensure that violence is detected. A co-mediation model is used, that is, one male and one female mediator from a mixture of legal, psychological and social work backgrounds to run the sessions together. This is considered to have particular advantages: providing a counterweight to bias; allowing the demands of the session to be shared and providing an opportunity for training and supervision of mediators; allowing clients to communicate with the person they feel most comfortable with; and providing a model of co-operation between the sexes.⁵⁶¹ The use of single mediators is now being trialled in matters concerning children.⁵⁶²

Recommendation 4.1

LACs should thoroughly evaluate the gender implications of the ADR processes and adopt best practice guidelines similar to those in the Family Court.

The particular needs of women of non-English speaking background

The need for legal assistance

4.27 People of non-English speaking background are particularly in need of legal assistance. For many the Australian legal system differs markedly from that in their country of origin. Those from countries with a civil law system may not be aware of the way the Australian system works and the role of lawyers where the parties have to present all the evidence and arguments. For those reasons and because of language difficulties, many women of non-English speaking background find it difficult or even impossible to represent themselves even in very routine matters. A survey by the Legal Service Commission of SA of community service workers found that people of non-English speaking background had a very poor understanding of the Australian legal system and the laws which affect them.⁵⁶³ Some had been intimidated by the legal system in their home country, and did not believe that the Australian legal system would protect their interests. The survey concluded that people of non-English speaking background 'require extra assistance and reassurance to establish confidence in the Australian legal system'.⁵⁶⁴

Women of non-English speaking background

4.28 Women of non-English speaking background are even more disadvantaged than men of a similar background, since they face the dual barriers of race and gender. The Full Court of the Family Court referred to the problem in a recent case.

Mrs Sajdak at the hearing had applied for orders to permit her to travel with her child to Poland to visit her mother who was seriously ill. Mrs Sajdak had sole custody of the child subject to a Family Court order that she was not to leave Australia with the child without the consent of the husband. On the day of the hearing her solicitors ceased to act for her as she had failed to qualify for legal aid. Her only way of supporting herself was by way of a supporting parent's benefit and she was unable to pay solicitor's fees. Her difficulties were also compounded by the fact that she could not speak English. She appeared for herself at the trial and was forced to rely on the assistance of an interpreter whom she considered was incompetent. Because she did not understand the court procedures she could not ask for an adjournment and failed to put vital evidence before the court. She lost the case. The husband was represented by Legal Aid at both the hearing and the appeal. Mrs Sajdak was again unrepresented at the appeal. The Court commented:

. . . the wife was placed in an impossible position by what had occurred . . .

The likelihood of an injustice occurring was greatly exacerbated by her lack of representation and in fact we have found that an injustice did occur in that she was unable to properly present her case.

*Further, we consider that legal aid authorities should pay more consideration to the problems of people for whom English is not a first language, particularly when they are as handicapped as the wife in this case. It is almost laughable to speak of notions such as equality of access to the courts in the context of a case such as this one. It is, we believe, intolerable that a person in the position of the wife in this case should be expected to present reasoned argument to an appellate court without legal representation.*⁵⁶⁵

Non-English speaking background legal aid services

4.29 Some LACs with statements of priority for legal aid (other than NSW) accord some priority to non-English speaking background clients. For example, in Victoria and the Northern Territory they are ranked fifth and in Queensland ninth. Some LACs provide services specifically for these clients. For example, the Legal Service Commission of SA has produced a guide to legal resources in South Australia for community workers involved with non English speaking background people. The Commission's survey referred to above found that those workers were the most common first point of contact for non English speaking background clients for all types of problems, including legal ones.⁵⁶⁶ Regular 'Legal Aid and How to Get It' seminars are held for newly arrived non-English speaking background people in SA. At a very basic level, legal aid advice leaflets need to be available in major non-English languages. Such leaflets are provided in NSW and Victoria but not in Queensland.

Recommendation 4.2

Legal aid guidelines in all jurisdictions should specifically state that culture and language difficulties affecting an applicant's capacity to cope with the legal system should be considered in determining priority for legal aid. Women's legal services should be funded in consultation with their local communities to target the specific needs of women of non-English speaking background.

Changing legal aid priorities

Redressing the balance

4.30 Significantly less legal aid money is directed towards areas of law of greatest concern to women than to areas of law of greatest concern to men. This chapter has described this imbalance and some of the reasons for it. The Commission has concluded that women are not being provided with a basic level of protection of their rights. The Commonwealth has a responsibility to rectify this situation because of its international treaty obligations, its obligations in federal matters such as family law and the fact that it is the greatest provider of funding for legal aid. To date the Commonwealth has not used its powers to the degree possible to ensure better use of legal aid to protect women's rights. Unless the Commonwealth is more directive in the determination of legal aid priorities, disproportionate legal aid funding will continue to be allocated to men. A more equitable distribution of funds is required between criminal cases on one hand and family and civil law cases on the other. The Access to Justice Committee has recommended that the Commonwealth take a more active role in formulating legal aid policy.⁵⁶⁷ The Commission supports this recommendation. To this end, the AJAC Committee has recommended that a Commonwealth legal aid body, the Australian Legal Aid Commission (ALAC), be established.⁵⁶⁸

Recommendation 4.3

The Commonwealth should take a more directive role in determining legal aid priorities in the interests of women. In particular it should ensure that the needs of applicants in family and civil matters are adequately met.

The Commission does not consider that a more directive role for the Commonwealth in funding threatens the wider independence of LACs. The AJAC Report acknowledged that, while it is important for LACs to retain their capacity to innovate and develop new programs and methods of providing assistance, this independence should not

extend to immunity from general directions as to the priorities that should be accorded to classes of cases, or the minimum entitlements of individuals to legal assistance as reflected in eligibility standards.⁵⁶⁹

A change in legal aid priorities could be effected in a number of ways. For example, the legal aid legislation in Victoria and Queensland could be amended to remove the statutory priority accorded to criminal cases. The Commonwealth has representatives on the LAC Boards of Management.⁵⁷⁰ They are briefed by LAFS

and have voting powers. They could be instructed to put forward proposals to change the guidelines. The Commonwealth also has the power to approve the annual budgets and programs of the LACs and can seek to influence them in this way.⁵⁷¹

LAFS report

4.31 The LAFS Report made various suggestions on ways to restrict expenditure in criminal matters, in order to provide more funding for other areas. These include the introduction of merit testing in all criminal matters, the introduction of extensive case guidelines in criminal matters, restriction on grants of aid to recidivists, the provision of aid only to persons facing a prison sentence of 3 years or more, the withdrawal of aid from summary matters, and program budgeting and the refusal of aid through lack of funds.⁵⁷² However, the Directors of the LACs considered that these changes would involve significant administrative costs, which would dissipate any savings achieved. The Directors also indicated that at least some of the options suggested would not be feasible in practice.⁵⁷³

Recommendation 4.4

The Commission recommends that the Attorney-General's Department undertake a detailed examination of legal aid legislation and guidelines to determine the most appropriate way to achieve this change in priorities. The Attorney-General's Department should determine the changes required to ensure that applicants in criminal, family and civil matters are accorded a minimum level of legal protection and assistance.

Other options for reform

Introduction

4.32 There are other ways of achieving equity for women, including an overall increase in the level of legal aid funding (as recommended in the AJAC Report⁵⁷⁴), with the extra money being earmarked for family and civil cases, or changes in the way legal aid and assistance is provided.

*Either legislation or agreement between the State and Commonwealth Government to earmark funds for civil and family matters, together with increased funding, will be necessary to fund adequately those areas of the law which are women's greatest need in terms of access to justice.*⁵⁷⁵

In recommending increased funding for legal aid, the AJAC Report stated that increases should not be allocated solely to casework but should be used for a range of preventative measures such as telephone legal advice services, community legal education programs and test cases to develop the law for the benefit of disadvantaged groups.⁵⁷⁶ While litigation assistance is important, LACs also need to consider the other avenues through which they can improve women's access to justice.⁵⁷⁷ Any increases in legal aid funding should not be earmarked solely for casework. LACs should have some flexibility as to the types of assistance to which to allocate funding. Litigation aid is the most costly form of assistance.⁵⁷⁸ Other cheaper services can assist women as well. For example, women are more likely than men to use other LAC services such as telephone advice lines and "Do-Your-Own Divorce" classes.⁵⁷⁹ These services are relatively inexpensive but they have the potential to reach and assist large numbers of women. These issues were considered in the Interim Report and are discussed in chapter 9. Other schemes with high success rates include court assistance schemes. There is significant variation between States in the extent to which they provide in-house services⁵⁸⁰ and fund community legal services to provide legal advice and representation.

Employ specialist advocates in legal aid commissions to assist women

4.33 LACs employ in-house legal advocates who often represent legally aided parties in court. This is one cost effective way to provide representation. In-house advocates can also become specialists in the less profitable areas of law which are of most concern to particular disadvantaged groups of clients. The employment in LACs of more advocates or duty lawyers (as in the ACT) who specialise in areas of law

affecting women would provide increased resources for women's legal representation at affordable cost. It could also ensure that women clients receive appropriate specialist assistance.

Fund community based services to employ women's advocates

4.34 Women often seek assistance from community based legal centres which they find sensitive to their situations and needs. These centres usually receive funds from several sources including both State and Commonwealth Governments and LACs. Few of these organisations are presently able to provide court representation at a significant level. Most are poorly funded and struggle even to meet demands for legal advice. They attempt to refer women elsewhere for court representation. Earmarked funds could be provided to community based organisations to enable them to undertake this representational work themselves. Many women would find this approach particularly appealing as they already deal with these organisations and have confidence in them.

4.35 ***Disbursement fund.*** The preparation of cases often requires the outlay of money before the trial for lawyers' expenses such as valuation reports on property. This expenditure may be recovered at the end of the proceedings but poorer clients often cannot afford the costs in advance. Another way to assist family and civil law clients is for LACs to establish and manage disbursement funds to assist clients to pay for these expenses as they are incurred.

5. Access to justice: women's legal services

Introduction

5.1 In its Interim Report, the Commission recommended that the National Women's Justice Program fund an additional specialist women's legal service in each State or Territory and a separate legal service for Aboriginal and Torres Strait Islander women where, after consultation with the women, it appeared necessary.⁵⁸¹ These recommendations have received general support, especially from parts of Australia where no service currently exists. This chapter explains in greater detail the role and structure of women's legal services.

General legal services

Women are not equally served

5.2 General legal services, whether private or community funded, are not serving women equally with men.⁵⁸² The Commission has identified several factors that cause particular problems for women to a greater extent than for men. These include

- lack of access to financial resources
- lack of services to deal with particular legal problems women face, especially domestic violence
- lack of provision in the legal system for the different needs of women who are housebound or socially isolated.

Women's legal services are one way to address some of these problems.

General community legal services

5.3 Outside the mainstream legal services, there are many community legal centres throughout Australia. These centres aim to provide legal advice and some legal representation to those in the community who cannot afford a private lawyer and have no other source of advice.⁵⁸³ Their work covers a broad spectrum - social security, housing and tenancy, consumer rights, family law, immigration and criminal law. Because generalist services are always unable to meet the demands placed upon them, some specialist services have been set up to cover a number of areas of law or types of problem. Women's legal services are one of these kinds of specialist services.

Women's legal services

Appropriate assistance for women

5.4 **An understanding environment.** Specialist women's services play a vital role in allowing women to voice their personal experiences and receive support and advice about personal legal matters.

*Women continue to express their desire to discuss legal problems with other women, in a service identified as a women's service . . . Women are often distrusting of men after they have been abused or exploited in a relationship and are concerned that they will be subject to the same treatment at the hands of a male lawyer who may identify more closely with their ex-partner. Sometimes women are embarrassed by their lack of knowledge of the legal system, or their family finances, or simply the humiliation of having been abandoned. They feel much more comfortable talking to other women about these matters because they trust they will not be further humiliated by them.*⁵⁸⁴

Women's specialist legal services have an important role. They are sensitive to women's needs in areas of law which particularly affect women. They have specialist knowledge of the way in which the legal system can discriminate against women and have an important function in educating the community and lobbying for reform in areas affecting women.⁵⁸⁵ The services are characterised by commitment in promoting women's legal rights.

5.5 *General nature of work.* Specialist women's legal services provide legal advice, information, representation and referral for women. Their activities cover areas of the general law which are of particular importance to women, such as social security entitlements, property disputes, consumer law problems, debt and tenancy rights. Existing women specific legal services report that the greatest demand for their services is in the areas of domestic violence and family law matters.⁵⁸⁶ Two aspects of their work - telephone advice and community education - were singled out in the Interim Report for specific recommendations.

5.6 *Telephone advice.* Telephone advice is an easily accessible way to provide basic level information to a large number of women. One of the major roles of women's legal services is to provide telephone advice.⁵⁸⁷ Through telephone advice services, women in isolated rural areas or women unable to leave suburban homes are able to obtain answers quickly. A 008 connection frees isolated women from bearing the cost and guarantees confidentiality;⁵⁸⁸ it avoids the problem of waiting three weeks for an appointment when all that is needed is the answer to a simple question and it eliminates transport and child care problems posed by having to leave the house. It also allows women who may feel embarrassed or intimidated to get information through a familiar technology with anonymity.⁵⁸⁹ However, a telephone advice and referral service cannot replace a full legal service. It needs to operate in conjunction with places to which clients needing complex advice and/or legal representation can be referred. Women's legal services therefore refer women to private and public solicitors or support services on whom they rely to provide reliable and understanding service to women.⁵⁹⁰ The Commission was told that consultations with the community concerned are necessary to ensure that each telephone service responds appropriately to particular needs.

5.7 *Community legal education.* Specialist services are particularly active in community legal education, reflecting a commitment to giving women greater control over their lives, because only through an understanding of their rights and how to enforce them can women make informed choices. The provision of education workshops, programs and written information assists in achieving women's full participation in the legal system. In the Interim Report the Commission recommended that the NWJP have a funding component for community education. This could be useful to help with the particular problems faced by women of non-English speaking background.

Existing women's legal services

5.8 *Currently three services.* There are only three women specific general legal services in Australia, the Women's Legal Resources Centre in Sydney, the Women's Legal Resource Group in Melbourne and the Women's Legal Service in Brisbane. All of them were initiated by groups of women in the community and have expanded to help meet community needs. They all receive funding from legal aid commissions. None of these legal services provides a significant level of legal representation and face to face legal advice is largely provided by volunteer solicitors. Their main role is legal advice and referral.

5.9 *The Women's Legal Resources Centre.* The Centre in Sydney was established in 1982 as the first women's legal centre in Australia. It provides telephone advice four and a half days a week, face to face interviews once a week in metropolitan Sydney and at Penrith and a monthly 'divorce clinic' to assist women in completing their own divorce forms. It employs four full time and two part time workers. It has been involved in producing kits on divorce, assault and victims' compensation. The Centre is currently involved in a project assessing the access of newly arrived migrant women to legal services and investigating the provision of a telephone typewriter service for deaf women.⁵⁹¹

5.10 *Women's Legal Resource Group.* In Melbourne the Women's Legal Resource Group established a one night a week telephone advice service in 1982. The service now provides advice 5 days a week. It is also involved in community legal education, research and law reform. The priority areas for 1993 were intervention orders, mediation, crimes compensation, decriminalisation of prostitution and industrial relations.⁵⁹²

5.11 **Women's Legal Service.** In Brisbane, the Women's Legal Service was established when a group of women collected \$250 to buy an answering machine. It provides a week day telephone legal information and referral service on all issues. It is developing policies for service provision to women of non-English speaking background and HIV positive women. It has nine staff, a management committee of ten and around 150 volunteers. The service also provides community legal education through lectures and the media.⁵⁹³

5.12 **Other States and Territories.** The Commission received many submissions from community groups seeking the extension of adequately funded services to underserved areas of Australia. They referred to attempts to establish a women's legal service in Western Australia⁵⁹⁴ and to the survival struggles of unfunded voluntary services in far North Queensland.⁵⁹⁵ There are no specialist women's legal centres in South Australia, Tasmania or the ACT.

Legal services for victims of domestic violence

5.13 **Specialist legal services.** Two other services specialise in domestic violence matters providing legal representation in court. In Sydney the Domestic Violence Advocacy Service, funded by the Legal Aid Commission, is the only community legal centre in Australia which specialises in providing legal help for women experiencing domestic violence.⁵⁹⁶ Domestic Violence Legal Help is a service of the Darwin Community Legal Centre and is funded by the NT Government. It provides a similar range of services as well as advice on matters related to domestic violence, such as family law and victims' compensation.⁵⁹⁷

5.14 **Other services.** Recently, a number of court assistance schemes have been established to offer assistance for victims of domestic violence.⁵⁹⁸ They are discussed in detail in chapter 6. There are also a number of sexual assault and domestic violence information and referral centres.⁵⁹⁹ Many women also obtain initial information about their legal rights and options from community groups and health centres. However these services do not provide legal services, such as legal casework, advocacy, legal education and law reform.

Lack of uniform services

5.15 The Commission was told that there were no women's legal services in Western Australia, South Australia and the Australian Capital Territory. There is no specialist service outside capital cities. As a result help for women in domestic violence situations depends on the responsiveness of the police and the ability of women to contact the relevant government body. Most legal advice or court support comes from non-legal centres, such as referral groups, refuges and health centres. Some local community welfare centres may provide a solicitor to give free advice one night a week. Consequently, legal help for women in these areas is often only available if the woman is in a crisis situation. If the police do not respond to the domestic violence, the woman is left to seek crisis intervention, legal advice and representation on her own. Community and welfare centres are forced to take on the responsibility of a specialised legal service that they are not able to cope with and are not adequately resourced to fulfil.

A proven product

5.16 Existing women's legal services are a proven product. Where these services are available they directly increase women's access to justice and empower women. They have a large and growing clientele.⁶⁰⁰ In an evaluation of the first three months of the Domestic Violence Legal Help service in Darwin, a comparison was done of outcomes of applications for restraining orders before and after the service was established. There was a substantial increase in the number of women who successfully obtained an order, from 43% to 72%. Applicants for orders were better able to present their case to the court when legally assisted. A consent order was more likely where the woman had someone to negotiate on her behalf. Specialist legal advice ensured that, where a restraining order was not appropriate, the woman was referred to other services elsewhere.⁶⁰¹

High demand and inadequate resources

5.17 **Demand for services.** Existing services cannot meet the demands placed upon them.

*[W]e've never been able to adequately meet the demand for services that are placed on our community legal centre.*⁶⁰²

Women's legal centres report that the waiting time to see a solicitor can be as long as four weeks, the wait for telephone advice as long as a fortnight. The Sydney centre has only one line operating due to limited funds.⁶⁰³ Other services can only operate part time. The cutbacks in legal aid funding for family law matters have intensified the pressures placed upon them. Due to demand they can now only assist women to prepare documents for the Family Court. They encounter demands for their services which they cannot meet. This is seen by the services as a pattern in community legal centres throughout Australia.⁶⁰⁴

5.18 *Effects on clients and staff.* This situation of low levels of resourcing and high levels of demand for these services works to the disadvantage both of women needing the services and of the staff themselves. Salary levels are extremely low compared with salaries in mainstream legal offices. This situation exists throughout community legal centres.⁶⁰⁵

(S)taff members . . . are not paid in accordance with any award rate because the Centre is not provided with sufficient funding to offer its staff full wage increases nor overtime pay . . . The Centre sets aside funds for long service pay and workers are entitled to take time in lieu for overtime work. However, time in lieu is seldom taken because of the volume of work. . . . a strict adherence to award conditions would mean cutting down staff and services as well as laying off people as they progress to higher increments.⁶⁰⁶

The work is stressful and workloads are excessive. Services experience a high staff turnover rate. They rely on large numbers of volunteers. While it is a deliberate policy to use volunteers it can also mean that there is a loss of experienced staff. As a result, Commonwealth and State governments are failing to maximise the funds allocated to the services. The services also consider that their role in educating key services providers and the community generally on women's rights is being limited by inadequate funding.⁶⁰⁷

The Centre would like to be able to afford to take on more test cases for areas which affect women and to pick up on many more problems referred to them. These cannot be realistically addressed by the Centre due to financial constraints.⁶⁰⁸

5.19 *Need for more funding.* For many women the need to contact someone for help and advice usually means that the woman is in crisis. In many cases violence has reached an extreme and sometimes life threatening level. Efficient, affordable and available legal intervention is essential in these circumstances. Current women's legal services consider that their model for service provision to women based on community needs is the best available. There is no need to alter the service provider model or to create a new type of service. Rather, an increase in the funding available to existing services and an increase in the number of services is required to increase significantly women's access to legal advice, referral and representation.

Concerns to be addressed in providing services

5.20 *Specialist services to be community based.* Mainstream services are often unable to provide a culturally appropriate service to their clients. Specialist women's legal services seek to respond to the specific legal needs of the community concerned and to be culturally and linguistically sensitive. Each service needs to determine the best means of service provision in consultation with the community serviced. For example, the Women's Legal Resources Centre in Granville, a western suburb of Sydney, has identified a demand for assistance with divorce matters for women of non-English speaking background. It is currently reporting on the needs of newly arrived migrant women accessing their service.⁶⁰⁹

5.21 *Culturally appropriate services.* The experiences of women of non-English speaking background differ from state to state. The size and cultural background of the communities also vary and need to be considered in appropriately servicing women's needs in those communities. For example, in Western Australia isolation and lack of services are particular problems for women in mining towns, many of whom have been

sponsored on spouse and fiancée visas. In the Northern Territory there is increasing interest in service provision to the immigrant community in Darwin but not in other areas.⁶¹⁰ In Tasmania there are many non-English speaking communities but they are each small in number, women of non-English speaking background continually struggle to have their needs recognised.⁶¹¹

5.22 *Locations of particular need.* The need for women's legal services is extreme in rural and isolated areas.⁶¹² The Commission received submissions from individuals, community centres and legal groups which reported that even general legal services are inadequate in rural and remote areas. Legal services that cater to women's needs are virtually non-existent.⁶¹³ In many areas the population will be too small to support a permanent service. New models, such as a travelling service, may be appropriate and should be trialled. Alternatively, a service similar to one being run by the Legal Aid Commission in Queensland may be appropriate. Under this scheme, women in isolated communities can communicate with the Legal Aid Commission through fax at their local council chambers.⁶¹⁴

5.23 *Best practice standards.* Expanding women's legal services must be linked with promoting best practice. This can be done through the National Women's Justice Program. Organisations attempting to establish a women's specialist legal service and existing services should have access to information on operational models, innovative services, funding and other issues that go to providing the best possible service with the resources available.

Recommendation 5.1

As a part of the National Women's Justice Program funding should be provided by the Commonwealth for an additional women's legal service in each State and Territory. Funding should include a separate component for programs to assist women of non-English speaking background and women in rural areas.

Specialist women's legal services for Aboriginal and Torres Strait Islander women

Introduction

5.24 In the Interim Report the Commission recommended the funding of legal resource and advocacy centres for indigenous women as pilot programs for an initial three year period as part of the national women's justice program.⁶¹⁵ The Commission has received an overwhelmingly positive response to this recommendation. In New South Wales and Queensland there has been independent progress towards the development of such services but a lack of secure funding.⁶¹⁶

Indigenous women are multiply disadvantaged

*[T]he problems for women stem from the fact that we're Aboriginal people as well as being women.*⁶¹⁷

Of all the identifiable groups of women whose concerns have been presented to the Commission, Aboriginal and Torres Strait Islander women are least well served by the legal system. This fact is related to, but not dictated by, the extreme social and economic disadvantage experienced by many Aboriginal and Torres Strait Islander women.⁶¹⁸

As a minority group within Australia's female population, Aboriginal and Torres Strait Islander women face significant cultural, economic, social and personal hurdles in their quest for recognition and equal opportunity.⁶¹⁹

Indigenous women suffer particular disadvantages both within the mainstream legal system and in the administration of Aboriginal and Torres Strait Islander legal services. Some of the discrimination they suffer, as women, is analogous to the discrimination suffered by non-indigenous women. Some of the

discrimination suffered by Aboriginal and Islander women is particular to them as indigenous Australian women.

5.25 Diversity of indigenous women. Indigenous women have different legal needs depending on the region of Australia in which they live and whether they reside in cities or rural communities. There is also considerable variation in culture and laws between rural communities across the country. In remote traditional communities the lack of basic services is often extreme and the practices of a legal system developed by urban white men quite foreign.⁶²⁰ Women in these communities face particular barriers to access to legal services.

5.26 Indigenous women's experience of the legal system. Aboriginal and Torres Strait Islander people are largely excluded from access to the benefits of the legal system. Among clients, practitioners and decision makers in the legal system, indigenous women are even fewer in number than indigenous men. Historically, Aboriginal and Torres Strait Islander peoples know the Australian legal system as one which authorised the annexation of their land and the loss of their lifestyle and many of their ritual roles. This has been the case for men and women but the impact has, in some senses, been different. Women have experienced their children being forcibly taken from them, have lost many of their women specific roles as custodians of culture, have been imprisoned and died in custody, grieved over relatives who have died in custody and have been subjected to violence perpetrated by non-Aboriginal and Aboriginal men, all with the express or apparent sanction of the law.⁶²¹ Aboriginal and Torres Strait Islander people, in particular women, are over represented in prison populations.⁶²² There are 178 indigenous women compared to 9 non-indigenous women per 100,000 people imprisoned in Australia.⁶²³ The disproportionately high level of incarceration of indigenous people, and particularly women, exacerbates the distrust of the legal system felt in many communities. Recognition of the problem of distrust of the mainstream legal system led to the setting up of legal services for indigenous people. However, these services often fail to meet the needs of indigenous women.

5.27 Aboriginal and Torres Strait Islander women as targets of violence. The level of violence experienced by Aboriginal and Torres Strait Islander women is generally higher than that experienced by other women.

The relatively suburban term 'domestic violence' does not come close to adequately describing the levels of violence perpetrated on Aboriginal women - typically by male perpetrators (not only the spouse), over a longer period, more commonly with weapons and more frequently resulting in severe injury.⁶²⁴

The number of indigenous women killed by their partners and male relatives is far greater than the number of indigenous deaths in custody.⁶²⁵ Consultations indicate that the majority of serious assaults against indigenous women are not reported.⁶²⁶ The reality experienced by most indigenous women is that the law provides them with little or no protection. In particular, few men who commit violent assaults against indigenous women are made accountable for these non-indigenous or indigenous crimes.⁶²⁷ There are various reasons for this. One is a reported lack of action by women in pursuing claims of violence. Specialised legal services for indigenous women should not be hindered by cultural alienation or by potential conflicts of interest from addressing the urgent legal needs of women survivors of violence.

*Domestic violence laws simply do not work in remote Aboriginal communities. . . . Aboriginal women simply have no access to legal information; their children tend to be very young; power in these communities rests squarely with the males; white police do not attend domestic violence situations; there is a serious degree of violence; the community council is male dominated and that council filters complaints to the police; there is, generally speaking, no women's council to represent women; . . . women don't get heard. . . . [T]he communities are effectively closed. . . . Women in these communities are also immobilised. . . . Restraining orders will not be enforced.*⁶²⁸

Indigenous women are not adequately served by the legal system

The case of Robyn Kina *R v Kina* is a disturbing example of the legal system's failure to serve an indigenous woman. In 1988 Robyn Kina was convicted of the murder of Tony Black and sentenced to imprisonment with hard labour for life. Robyn Kina had been subjected to extreme abuse by

Black, her partner, during the three years prior to the killing, including on the morning of the killing. However, she did not give evidence at her trial and evidence of the links between this history of abuse and her actions on that morning was never presented to the trial court. Her trial on the murder charge took less than one day. No evidence was presented in her defence. In 1993, on appeal, the Supreme Court of Queensland set aside her conviction as a miscarriage of justice. She did not receive a fair trial due to 'problems, difficulties, misunderstandings and mishaps occurring in the communication of my instructions to the lawyers'.⁶²⁹ The Court stated that:

*[None] of the lawyers who acted for the appellant received any training or instructions concerning how to communicate or deal with Aborigines or Islanders.*⁶³⁰

Some of Robyn Kina's legal representatives worked for the Aboriginal Legal Service; others did not. The Public Defender sent a young white male legal clerk to take a statement from her in prison. Her situation was ignored. She was wrongly convicted of murder and spent five years in prison.

5.28 Ignorance of indigenous cultures within the legal profession. There continues to be a disturbing level of ignorance of Aboriginal and Torres Strait Islander cultures in the legal profession and in the courts. While this affects both men and women it has a specific impact on women. The Commission has been told of sign language being used to intimidate victim witnesses giving evidence, unknown to the court.⁶³¹ During a rape trial in Alice Springs in 1992:

a young adult female witness was asked by the prosecutor about the nature of her relationship to a previous male witness who was of the same age as her. She replied 'grandson', and there were smiling grimaces and expressions of disbelief by the prosecutors, judge and court personnel, none of whom had even a basic understanding of the kinship system and 'skin' or subsection groupings. She was asked the question again and she gave the same answer. Apart from the inescapable conclusion that the prosecutor had not spent enough time with the witness prior to the trial, the experience was at best confusing and at worst humiliating for her.⁶³²

5.29 Women's business and men's business. In some traditional indigenous communities there is joint and separate business for women and men.⁶³³ Aboriginal and Torres Strait Islander women have responsibility for the protection and maintenance of women's sacred sites, women's ceremonies and women's business. Under traditional law, women are forbidden to disclose this law business to men. Lack of understanding of the significance of women's and men's business has hindered communication of cultural information between indigenous and non-indigenous people. A representative of one Aboriginal organisation submitted:

*This leads to problems for Aboriginal women attempting to exercise their rights under the non-Aboriginal legal system which is male dominated and usually does not have procedures for dealing with Aboriginal women's business in a culturally appropriate way.*⁶³⁴

The division between women's and men's business has often resulted in the legal system only getting half the story when it comes to issues involving women. In matters of land rights and the protection of sacred sites, government consultations at federal, State and Territory level are often conducted exclusively by men.

*Women are often required to compromise in these circumstances, in a way that men never have to. . . . Aboriginal women are then in the difficult position of either not disclosing . . . women's business that may be relevant to the hearing or to compromise their Law by revealing material that should only be revealed to other women. In many claims this is resolved by not revealing the women's business.*⁶³⁵

The legal system's lack of understanding of the division between women's and men's business also often compromises the administration of justice in cases of violence against women. Evidence of women's perspectives may simply fail to be brought before the court.

White lawyers, particularly male lawyers, have accepted Aboriginal men's explanation that traditional law sanctions their violent assaults against women in a whole variety of circumstances.⁶³⁶

However,

When traditional women are asked about rape and about the incidence of incestuous sexual assaults, their responses are emphatic that it is not Aboriginal way, that it is not in accordance with Aboriginal traditions or customary law. . . . They said that a man could be put to death for rape or speared in the thigh, and if a man continued to sexually harass a woman he would certainly be put to death.⁶³⁷

Consultations indicate that, even in cases that directly concern Aboriginal and Torres Strait Islander women, their views are being given little acknowledgment in the Australian legal system.

5.30 *Aboriginal and Torres Strait Islander legal services.* There is a network of Aboriginal and Torres Strait Islander legal services in Australia.⁶³⁸ Services within this network are located in each state and Territory. Each service determines its own policies to serve the legal needs of the Aboriginal and Torres Strait Islander communities in its local area.

5.31 *Policy of most existing Aboriginal and Torres Strait Islander legal services.* Most Aboriginal and Torres Strait Islander legal services do not currently benefit women and men equally. This is a result of the combined effect of two common practices. First, most services implement a policy of not acting for either party in a matter between two indigenous clients. Second, most legal services give priority to defending criminal cases over other matters.⁶³⁹ On their face these practices appear gender neutral, but their effect is to indirectly discriminate against indigenous women.⁶⁴⁰ Like most groups of women, indigenous women often need legal assistance in relation to matters of family violence and family law. For most indigenous women such disputes are with other indigenous people. The outcome of precluding women from receiving assistance for such matters is that indigenous women are disadvantaged compared to indigenous men and compared to other women.

*Women's access to law is severely limited since white private law firms do not take on the work, and as the various inquiries into Aboriginal people's use of legal aid services show, there is some reluctance to use non-Aboriginal services, and those services are not widespread enough to reach into rural areas.*⁶⁴¹

In addition, where Aboriginal and Torres Strait Islander legal services are staffed predominantly or exclusively by men, there is potential for the separation of women's business and men's business to preclude the service adequately dealing with certain legal issues for women. Because of the barriers of cost, language and cultural alienation which discourage most Aboriginal and Torres Strait Islander people from using mainstream legal services, indigenous women who can obtain no assistance from their own legal services are left without legal recourse. Further, the fact that the funded Aboriginal and Torres Strait Islander legal services rarely prosecute matters of family violence conveys the message that Australian society condones violence in the home.⁶⁴² Indigenous women's need for access to legal advice and representation seems to be greatest in the areas of civil law, family law, family violence, sexual assault and victims' compensation.⁶⁴³

Successful initiatives

5.32 Aboriginal and Torres Strait Islander women in various parts of Australia have developed a number of initiatives which are beginning to increase their access to justice. In central Australia a number of night patrols are run and staffed by women.⁶⁴⁴ Night patrols are a community policing initiative which is consistent with customary law and traditional authority structures. The women in the night patrols are recognised authority figures in the communities. These women patrol the streets to reduce community disturbances. Night patrols are actively supported by the Northern Territory police. It is reported that night patrols have been instrumental in reducing the level of violence in remote communities and in town camps.⁶⁴⁵ Another women's initiative is the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPY Women's Council).⁶⁴⁶ This organisation of Aboriginal women has initiated a diverse range of projects for the benefit of their communities including raising money for the purchase of women-only transport vehicles,⁶⁴⁷ facilitating women's participation in land rights debates and taking collective action against the abuse of alcohol in their communities.⁶⁴⁸ Currently the NPY Women's Council is working on a funded project to develop community strategies to prevent family violence.⁶⁴⁹ These and other projects of the NPY Women's Council are measures which directly increase women's ability to access justice. At Parramatta and Redfern courts in Sydney, Aboriginal women are staffing support schemes for women witnesses and defendants.⁶⁵⁰ In Wilcannia in

New South Wales, the 'Women's Business Project' has worked at increasing Aboriginal women's access to legal and other services.⁶⁵¹ At a recent conference in Brisbane, Aboriginal and Torres Strait Islander women described the empowering effect of having women from their own communities trained as Justices of the Peace. They raised the need for shelters and safe houses as well as legal services.⁶⁵²

Responses need to be specific to women and to the communities

5.33 The initiatives which have improved access to justice for Aboriginal and Torres Strait Islander women demonstrate that solutions reside in the women and in the communities.⁶⁵³ Unfortunately, the initiatives described here are still rare. Funded initiatives for Aboriginal and Torres Strait Islander communities are often structured and implemented with little or no regard for the priorities of women and fewer still include women in decision making roles.⁶⁵⁴ Consultations confirm indigenous women's dissatisfaction with this situation and their demand for involvement in the control of services for their communities.⁶⁵⁵ It is essential that measures to increase indigenous women's access to justice begin by giving status to women. This requires that women determine the nature of the service and control the delivery of the service.

What is the most appropriate response?

5.34 ***Changing the law.*** Some indigenous women contend that they are better served by customary law than white law and speak nostalgically of the protection from crime, particularly excessive violence, that traditional law afforded their communities.

Aboriginal women need to be involved in the process of redefining and articulating customary law; that is, mechanisms of social organisation and social control which allowed Aboriginal society to function before invasion.⁶⁵⁶

The merits of the recognition of customary law are controversial. In this report the Commission does not comment on whether redefining customary law for modern needs is an appropriate measure to increase access to justice in Aboriginal and Islander communities.⁶⁵⁷ However it is clear that women must be involved in the formulation and implementation of whatever measures are appropriate to ensure safety and respect for human rights in Aboriginal and Torres Strait Islander communities. Indigenous women must be empowered in the regulation of their own communities. This might include a role for customary law. Legal services which adequately serve indigenous women would contribute to this process because as has been discussed in regard to general women's legal services these could provide a focus for developing community based expertise and policies regarding women's needs of the legal system.

5.35 ***Providing appropriate services.*** The need for legal services which are responsive to the needs of Aboriginal and Torres Strait Islander women is urgent.⁶⁵⁸ In many instances the most appropriate solution would seem to be separate legal services for indigenous women. Consultations indicate strong support for specific legal services for indigenous women as a strategy that could successfully increase their access to justice.⁶⁵⁹

*What we've been trying to do [is] set up an Aboriginal women's legal and advocacy centre. A centre that would be able to give information to Aboriginal women . . . and which would also be able to provide community education . . . to let people know what their rights are. . . . We also want to be able to provide professional training to other solicitors and magistrates and police and Aboriginal workers. We also want to have a 008 number so that women throughout the State are able to access immediate and confidential information. But the important thing, we think, is that we need to have a centre that is run and co-ordinated by Aboriginal women for Aboriginal women and we think we know what the answers are - we do know what the answers are . . .*⁶⁶⁰

The role of services for indigenous women

5.36 ***Culturally appropriate information, referral and representation.*** An Aboriginal and Islander women's legal service could provide culturally appropriate information and referral on any legal matter. Many indigenous women's alienation from existing services is such that they rarely approach a lawyer for initial advice and are even less likely to pursue a legal remedy in relation to a legitimate legal claim.

*Aboriginal women need to be able to make an informed decision. That is, whether they choose to use the law or whether they choose not to use the law. In most instances, the choice has been taken away from them by the legal system's inability to provide a culturally appropriate and sensitive legal service.*⁶⁶¹

A service where Aboriginal and Torres Strait Islander women could freely discuss women's business is likely to increase their use of and participation in the legal system. In the event of a case progressing to litigation, an Aboriginal and Islander women's legal service could ensure that an indigenous woman's evidence is accurately recorded and increase the likelihood that the evidence is properly presented to the court.⁶⁶² The service could support the women in bringing the case.

5.37 Indigenous women's legal services as educators. Presenting accurate information to courts serves an educative function. In addition, like other community legal services, Aboriginal and Islander women's legal services could engage in community education and law reform as well as providing legal advice. The ignorance of indigenous women's cultures which currently creates a barrier between indigenous women and the legal system can be redressed through education.⁶⁶³ The people best able to increase knowledge about the realities of Aboriginal and Torres Strait Islander women's lives are Aboriginal and Torres Strait Islander women.

Recommendation 5.2

The NWJP should fund the establishment of legal services for Aboriginal and Torres Strait Islander women in areas where consultation with the local indigenous women indicates a demand for such a service. In determining the location of the services, the following matters are to be taken into account:

- **The services are, where possible, to be staffed and managed by Aboriginal and Torres Strait Islander women. The type of legal service provided should be determined by the women of the communities to be served.**
- **The services are to be targeted at regions of greatest need, having particular regard to remoteness and existing services in the region.**
- **The existence of community networks which are demanding such a service and which will use and support the service.**

6. Access to justice: court support schemes

Introduction

6.1 The Access to Justice Advisory Committee's Report acknowledged that court support schemes are an important initiative being undertaken by community organisations.⁶⁶⁴ A number of different schemes operate at a general level to assist people who come into contact with the court. For women attending court in domestic violence matters, these community based schemes offer a level of protection, support and advice otherwise unavailable from the court system. For women seeking apprehended violence orders there are two types of support schemes operating. The first offers pre-court information, personalised support in court and post-court counselling. The second provides these services and in addition legal advice and representation in court. This chapter examines some models where legal advice and representation is an integral part of court support schemes and proposes their expansion.

Women going to court need support

6.2 At a recent conference on domestic violence it was reported that many women find it difficult to contemplate using the court system to obtain protection from someone they have loved and, indeed, may still love.

They may have to overcome a continuing emotional attachment to the perpetrator, a belief that counselling could stop the violence, economic dependence on the perpetrator, loss of a home and access to the children's schools to name but a few of the hurdles they must get over. Often women must deal with:

- the fear that legal action will exacerbate the problem of violence or harassment and lead to reprisals against themselves and/or their children;
- previous negative experiences when seeking help from either professional workers, police, chamber magistrates, magistrates, lawyers, etc;
- intimidation by or lack of faith in the court process and lack of knowledge about what remedies are available;
- communication difficulties for women of non-English speaking background or women with disabilities;
- previous unsuccessful attempts to obtain orders eg withdrawal of the complaint based on undertakings which have been breached;
- a lack of continued support and follow up.⁶⁶⁵

Court assistance schemes help women who have been subjected to violence by their partners to address these needs.

*Going to court and seeking an order can be a frightening and traumatic experience for many women, the kind of emotional support they need is often more than a sympathetic solicitor can provide. Furthermore acquiring an Apprehended Violence Order, while a critical and brave step, is obviously not enough. Some women may need emergency housing, medical attention, trauma counselling, access to child care, information about employment retraining and generally continual emotional support. All these services are fundamental to helping women escape and break the cycle of violence. But these are services which the law does not provide and knows little about. Yet it has been my experience that the Court Support Scheme was the first point of contact for many women. It is of concern that so many women had not sought assistance from community agencies or government departments, which makes Court Support Schemes an essential service.*⁶⁶⁶

Existing court support assistance schemes

Introduction

6.3 Court support services have developed as a response to some of the problems faced by women at court when they seek protection from domestic violence.

For example, legal representation may not be available, police prosecutors often do not have adequate time to talk to the woman, and as a result there may not be anyone available to advise her about the court process and discuss the conditions of her order. She may also need information, referral services and emotional support to assist her.⁶⁶⁷

Currently there are a number of court assistance schemes operating in parts of urban and rural Australia.⁶⁶⁸ All the schemes have been based on the Women's Domestic Violence Court Assistance Scheme which has been operating at Redfern Local Court and coordinated by Redfern Legal Centre since March 1990. The model has been used and adapted in other areas to suit community needs. The schemes vary greatly in terms of the representation provided, underlying aims, the degree of coordination, accountability, funding and training of workers.

Redfern model⁶⁶⁹

6.4 The Redfern Scheme is built upon an interactive, co-operative relationship between solicitor and support worker. Solicitors may be employed by a community legal centre or be private practitioners or court appointed duty solicitors. The solicitor provides professional advice and follow up advice if necessary. The support persons are social welfare professionals usually from local community services. The support workers explain the court process, layout and personnel, take initial instructions and, since women seeking court intervention are often in crisis, investigate the non-legal aspects of the client's situation including housing, financial and counselling needs. Their role is integral to the legal process. Underpinning the Scheme is the belief that solicitors working hand in hand with trained support workers will provide a more effective service than either solicitors or support workers independently. The participants in the scheme acknowledge that the service should be run by women for women. In some circumstances, however, women solicitors may not be available and it may be necessary to have male solicitors appearing.

Waverley Domestic Violence Court Support Scheme, Waverley Local Court

6.5 A pilot project was set up in August 1993 by Kingsford Legal Centre and the Eastern Suburbs Domestic Violence Committee to establish a Court Support Scheme for domestic violence complainants at Waverley Local Court. Solicitors from the Centre and two private solicitors volunteer their time once a week to assist unrepresented women seeking Apprehended Violence Orders (AVOs). Community workers provide emotional support and information about such things as emergency housing, medical attention and employment training. The scheme requires a room at the Local Court that is big enough for women to wait comfortably with their children, allowing privacy away from the offender and discussion with the solicitor and community worker. Since the scheme started it has represented one third of the women seeking AVOs at Waverley Court. It has been the first point of contact for most of the women. It has provided valuable assistance to women. However it is run without resources relying on volunteers who conduct the Scheme in addition to their normal workload. It is not separately funded by the government.⁶⁷⁰

Parramatta Domestic Violence Court Assistance Scheme, Parramatta Local Court

6.6 The Parramatta Scheme commenced in November 1993 as a pilot project administered by the Macquarie Legal Centre. Two solicitors and two support workers are on duty at Parramatta Local Court each Tuesday. One of the solicitors comes from the Domestic Violence Advocacy Service and the other from a roster of private solicitors. All support workers are female community health or welfare workers. Most of the referrals for the Scheme come from the Chamber Magistrate at Parramatta Local Court.⁶⁷¹

Domestic Violence Assistance Scheme, Burwood Local Court

6.7 The Burwood Community Welfare Service Centre has a similar domestic violence court scheme at Burwood Local Court in conjunction with the Victims Care Unit at Burwood police station. The scheme

differs from others in that referrals are directed to the police prosecutors at the station rather than to community or private solicitors. The Scheme was funded in 1993 for one year by the Office for the Status of Women and is no longer operating. The Scheme was based on the Redfern model with adjustments to suit the needs of the community in which 75% of its clients were women from non-English speaking background.

Domestic Violence Court Assistance Scheme, Hobart

6.8 The Domestic Violence Co-ordinating Committee in Hobart has set up a scheme, based on the Redfern model as a pilot project for the next six months at the Hobart Court of Petty Sessions. The Hobart Court is much larger than Redfern Local Court. Operation of a scheme one day a week does not deal with domestic violence matters for Hobart and other areas of Tasmania which come before the court frequently on other days of the week

A proven product

6.9 The various existing court assistance schemes have had overwhelming success.

The results (at Redfern Local Court) indicate that the percentage of withdrawals (both with and without undertakings) for proceedings was significantly less for complainants represented by the Scheme than either those unrepresented or those complainants making applications prior to the Scheme's inception. More significantly the percentage of successful orders obtained markedly increased under the operation of the Scheme. It is believed that this increase in the number of orders successfully obtained is a combination of solicitors' experience in acting for victims of domestic violence, the use of trained support workers to provide information on issues such as the court process, income security, housing and on going support services. Qualitative feedback from our clients indicates strong support for the holistic approach, a feeling of empowerment and a consistent desire that the Scheme continue at Redfern Court and be established at other courts.⁶⁷²

Before the scheme commenced in 1989, 41.8% of women applying for AVOs at Redfern Local Court were unrepresented. In 1993, all women applying for AVOs at Redfern Court were represented either by the Scheme (the majority of cases), the police or private practitioners. Before the scheme commenced only 35.7% of women complainants who were represented obtained AVOs compared with the current 76.4% of women represented by the Scheme who obtain final orders. In 1993 the number of clients represented by the Scheme who had their matter dismissed was less than one percent (0.92%).⁶⁷³ The Scheme has assisted as many as fifteen women on a day. Because of the involvement of two local Aboriginal women's organisations, the number of indigenous women seeking orders has more than doubled over the last three years.⁶⁷⁴

In a recent case, a woman from the South Coast who couldn't get any help from her local police or Chamber Magistrate, heard about the Scheme and travelled to Sydney to apply for an order. With the assistance of the Chamber Magistrate at Redfern Local Court and the Scheme she applied for an order and had her matter adjourned to her local court where she afterwards was assisted by her local domestic violence support group. Fortunately for the women we assist, the Chamber Magistrate at Redfern is prepared to take applications from women outside the South Sydney area so that women can use our Scheme.⁶⁷⁵

A recent evaluation of the Waverley Local Court scheme has also enabled workers to identify the basic pattern and operation of domestic violence orders in the court, the percentage of them in relation to other court matters and the improvements the scheme has made in the number of women represented and the success rate of orders being granted.⁶⁷⁶

The mere fact that the Scheme (with a feminist based philosophy) exists was seen as a strength to quite a few workers. Other positive aspects of the Scheme were the empowerment of women, the great support for women complainants the service provided, a true commitment of the solicitors and workers and a genuine recognition by the court of the Scheme.⁶⁷⁷

The magistrates at Waverley Local Court indicated that because of the Scheme more complaints were now proceeding than were being withdrawn.⁶⁷⁸ The majority of police officers interviewed had referred women to the Scheme and more than half noted that women were taking out more AVOs.⁶⁷⁹ At Parramatta Local Court, an evaluation of the scheme has indicated that more consent orders are gained with the assistance of the scheme than where women are unrepresented. Similarly, more hearings are set and there are less withdrawals since the scheme commenced. Regular meetings are held between the Chief Magistrate and all key users of the court, including the workers of the court assistance scheme. The involvement of private solicitors in the

Scheme has been beneficial in providing women with additional assistance, advice and representation in family law matters which are often related to domestic violence.⁶⁸⁰

Improving court support for women

Better funding for existing schemes

6.10 All existing schemes operate for only one day a week. At Waverley court both the magistrates and court staff considered that the scheme had improved the flow of work in the court and recommended the extension of the scheme to other days.⁶⁸¹ Urgent ex parte applications, interim and final orders and breach proceedings are listed throughout the week in most local courts and there is a great need for the schemes to operate every day. In Hobart, other community services, such as the Domestic Violence Crisis Service and refuges, continue to provide an ad hoc response to requests for court support at other times. There are many women who still do not receive appropriate court support and remain unaware of the assistance and other services available to them.⁶⁸² Community workers and solicitors can only give limited time to the schemes because of the need to present at court all day and the fact that their commitment to the scheme was voluntary and in addition to their other work commitments.⁶⁸³ In the cases of the scheme operating at Burwood local court, funding has ceased due to initial funding being on the basis of a one-off government grant for one year.⁶⁸⁴

Establishing new schemes

6.11 New schemes are required at other courts but other structures will be required. Not many communities have a community legal centre, especially in rural and isolated areas. However, most regions are well serviced by private solicitors. Those experienced in domestic violence and the needs of women could be used on a roster basis but, without funding, they must be prepared to act on a voluntary basis. At Macquarie Legal Centre local private solicitors work on a *pro bono* basis. In country areas where the police commonly initiate the majority of complaints, the schemes could use police prosecutors. In country areas of Queensland a number of local domestic violence services train volunteer support workers who work with police prosecutors in this way.⁶⁸⁵ A recent conference on domestic violence recommended that funding be made available for court assistance schemes on a national basis.⁶⁸⁶

Recommendation 6.1

The National Women's Justice Program should provide funds to expand existing court support schemes and to establish new schemes.

The various legal professional bodies should take an active role in these schemes through encouraging members to participate on a *pro bono* basis.

7. Access to justice: court facilities and processes

Introduction

7.1 The Commission's Interim Report on equality before the law identified the practical barriers women experience when seeking justice in the courts. These areas of concern included:

- lack of interpreters
- the lack of child care facilities in court
- the lack of separate waiting areas for victims of violence
- the lack of sufficient confidential areas for consultation with lawyers
- the intimidating and often hostile nature of the court process, particularly in relation to domestic violence and sexual assault.⁶⁸⁷

The nature and complexity of domestic violence and sexual assault require a greater level of support, legal advice, specialised services and sensitive court processes for women than the legal system currently offers. This issue has been raised repeatedly in submissions and in responses to the Interim Report.⁶⁸⁸ It reflects the common experience of women going to court. This chapter examines in greater detail the barriers women encounter at the court.

Interpreters

The importance of interpreters

7.2 The Commission's report *Multiculturalism and the law* (ALRC 57) recognised that effective communication with people at all levels of the legal system requires access to competent interpreters where a person is unable to communicate fluently in English.⁶⁸⁹ The federal Department of Immigration and Ethnic Affairs provides both telephone and on-site interpreting services. The Ethnic Affairs Commission in each State provides most interpreting services in courts.⁶⁹⁰ The Commission has been told that this is a particular problem for women of non-English speaking background, who face additional and different problems from other women and from men of non-English speaking background. These problems present critical barriers to their ability to seek and obtain legal remedies.⁶⁹¹

NESB women in Australia face similar difficulties when accessing legal services as other women in the community face . . . However difficulties arise because of poor knowledge of the English language and from cultural expectations. . . . Case studies from a number of research reports and anecdotal evidence reveal that NESB women's experience in the legal system is more traumatic. . . . The immigration process isolates NESB women. Having left behind their families and other support networks women of NESB find themselves in their new country dependent on men, as wives, mothers and daughters. Having to bring up young children migrant women have less opportunities to learn the English language than male NESB immigrants and their access to services is inhibited by their lack of knowledge of where to turn to for help and from inability to communicate effectively with service providers.

Lacking the ability to communicate effectively in English, NESB women are less likely to understand the law, to learn about their legal rights and how to exercise them. Little or no information is available in community languages and anecdotal evidence points out that NESB women may be denied the provision of legal interpreters or they may have no choice in their request to use female interpreters.⁶⁹²

Submissions to the Commission stressed that assistance to women of non-English speaking background should be a right rather than a privilege.

*Whilst specific attention must be given to the additional needs of NESB women, resistance must be made towards the current trends within the legal system to reduce women to a 'special needs' group. This serves to encourage an attitude of deficit on the part of the woman herself. . . . The notion of legal protection must be identified as a right, rather than a privilege which is to be offered or delivered differentially to NESB women.*⁶⁹³

The problem most frequently raised in consultations with representatives of non-English speaking background women's organisations is the lack of interpreters.

A case study

7.3 The Commission consulted many non-English speaking background women's groups and received a number of submissions in the course of the inquiry. The following case study typical of the caseload at the Women's Legal Resource Centre illustrates the language and cultural barriers a non-English speaking background woman faces when confronting the legal system.⁶⁹⁴ It demonstrates how a relatively simple procedure can become complex for non-English speaking background women to solve themselves. It shows the role that a women's legal centre can play in assisting women as well as the importance of interpreters.

Mrs B was born in Turkey and had limited command and understanding of English. She contacted the Women's Legal Centre to assist her obtain a divorce. With the aid of an interpreter she was assisted to complete her divorce application. She was told in detail about filing the papers at Court. However, she did not understand that she could not serve the papers herself.

When she finally enquired about the process she was out of time for service if her husband did not consent. The Centre helped her to serve the papers and a solicitor accompanied her to Court. Her husband was at the Court and he also spoke a little English. He indicated that he would consent to the divorce. When the Registrar was told that Mr B consented but that his English was not extensive he granted an adjournment and ordered that translations of the documents be served on him.

However, Mrs B, a pensioner, could not afford this as the Ethnic Affairs Commission charges \$20 per hundred words, making the cost of the total job some hundreds of dollars. At the court appearance her solicitor requested that the Court provide a Turkish interpreter. The Registrar requested we approach the Chief Registrar to confirm that the husband did indeed consent to the divorce.

*The Centre contacted the Chief Registrar, who agreed in view of Mrs B's circumstances (little English, no money, chronically sick child) that the Court would provide a Turkish interpreter at the next court appearance to ensure that Mr B understood what he was consenting to. The Centre contacted Mr B through a Turkish Community worker who ensured that he would attend Court. The Centre attended Court with Mrs B, Mr B and the interpreter and after the initial conference they again went to Court and explained what had happened to the Registrar, who granted the divorce.*⁶⁹⁵

7.4 Police and interpreters. Women need interpreters when dealing with the police. AJAC recommended that there be a statutory right to an interpreter for a suspect during the criminal investigation process.

The Commonwealth should, through the Standing Committee of Attorneys-General, continue to encourage the States to enact legislation that guarantees suspects a right to an interpreter throughout the criminal investigation process, once the investigating official has reasonable grounds to believe the person cannot communicate in a reasonably fluent manner. Adequate resources will need to be provided by governments to ensure the availability of interpreters.⁶⁹⁶

Provisions in some States protect the right of suspects or alleged offenders.⁶⁹⁷ However, these provisions do not appear to cover either the perpetrator or the woman in investigations of domestic violence. In

circumstances where there has been a breach of an apprehended violence order or where criminal charges are being considered, the woman has no right to an interpreter. The AJAC recommendation does not address this issue. Women of non-English speaking background seek legal help and redress most often in relation to domestic violence, sexual assault and family law matters, such as divorce proceedings, custody and property settlements. The overwhelming majority of submissions to the Commission on the needs of these women described experiences in domestic violence matters.⁶⁹⁸ They demonstrate the problems that can arise when the victim of domestic violence cannot be understood at the initial stages of the investigation process.

7.5 Reluctance of police to use interpreters. The Commission was told of reluctance by police officers attending domestic violence incidents to use interpreters.⁶⁹⁹ Without an interpreter police may not understand the gravity of the woman's situation. This may ultimately deny her the right to protection of her physical safety. A woman may face difficulties if she is seen to be taking action personally against her spouse. The Commission was told that she would get support from her community if police act for her but not if she is seen to be taking action herself.⁷⁰⁰ The police are crucial in ensuring women's safety. There is also a risk that statements taken by police from victims of sexual assault and domestic violence in the absence of an interpreter may not record all the relevant information. This may have a significant bearing not only on investigation of the offence but also on evidence presented to the court to support the application for an apprehended domestic violence order and claims for criminal compensation.

*A Chinese woman was assaulted by her English de facto partner. When police were called they did not advise the woman of the availability of AVOs and did not charge the perpetrator, having formed the view that the parties had been arguing over the use of the television. After intervention by the Domestic Violence Advocacy Service, police initiated a complaint, but did not speak to the victim about what had happened and about the perpetrator's past behaviour towards her. Consequently the complaint particularised only a minor dispute and placed the victim at risk of having her complaint dismissed.*⁷⁰¹

*A woman who was hospitalised after she sustained a serious assault at the hands of her violent husband was 'persuaded' by police to sign a statement requiring them to take no further action. They said there was not enough evidence. When they took her initial statement they did not use an accredited interpreter, and they told her that if she really wanted to get away from the violent husband she should leave the country.*⁷⁰²

7.6 Federal Police. Members of the Federal Police can be involved in domestic violence cases principally where there is a protection order under the *Family Law Act 1975* (Cth) or where a child is abducted or where the event occurs in the ACT. The Federal Police told the Commission that, when an interpreter is needed, for example, in the context of child abduction cases, police follow internal guidelines on interpreters.⁷⁰³ These guidelines very briefly specify the need for an interpreter when interviewing, interrogating or taking a statement from a person who the officer reasonably believes 'does not fully understand or speak the English language'. There is no requirement that the police ask the woman if she needs an interpreter. The Commission understands that problems arise in identifying interpreters that the Federal Police can regularly use. Often an interpreter of the specific language needed or a female interpreter, if requested, is unobtainable through the current structures. Police are often forced to rely on family members to interpret. There needs to be a much larger pool of interpreters for the police to use.

7.7 Amending police standing orders. A submission from the Federation of Community Legal Centres in Victoria suggested that police standing orders on attending domestic violence calls should be amended to require police to use interpreters when dealing with women from non-English speaking backgrounds.⁷⁰⁴ This would address the present situation where police use their own discretion as to the need for an interpreter and are said to underestimate that need.⁷⁰⁵ The Commission supports this proposal.

7.8 The AJAC recommendation. AJAC recommended that the Commonwealth's role is to encourage the States and Territories through the Standing Committee of Attorneys-General to enact legislation protecting the right of suspects to an interpreter in the criminal investigation process. The Commission supports this recommendation. In addition it recommends that the Commonwealth should encourage States and Territories

to protect a woman's right to an interpreter in the process of investigating an allegation of sexual assault or domestic violence.

Recommendation 7.1

- a) The Federal Police and State and Territory police forces should adopt clear policy guidelines requiring the use of interpreter services in cases of sexual assault or domestic violence in interviews with suspected perpetrators and women who require interpreters. Police standing orders should be amended to give effect to this requirement.**
- b) The Commonwealth, through the Standing Committee of Attorneys-General, should encourage the States and Territories to enact legislation to protect the right of women to an interpreter throughout the investigation process where they have been the target of sexual assault or domestic violence.**

Courts and interpreters

7.9 Discretion, not a right. At common law, there is no right to give evidence in court in one's own language through an interpreter.⁷⁰⁶ A number of States and Territories have enacted legislation to guarantee a right to an interpreter.⁷⁰⁷ Otherwise, there is a broad judicial discretion to allow an interpreter when the court considers one necessary or desirable. In some cases the courts ask women if they would like an interpreter but do not inform them of any right to request one. The women's wish not to be seen as difficult or the implied attitude that it will be a nuisance to arrange an interpreter may discourage her from asking for one.⁷⁰⁸

*Lawyers and community workers report that there is a general impatience throughout the system when people from non-English speaking backgrounds are involved. Women who don't speak English are often treated as non entities, and/or are patronised. This impatient tone has an intimidatory effect on women who are unlikely to be familiar with Australian legal processes and unconfident and therefore unable to effectively assert their needs.*⁷⁰⁹

7.10 Misuse of discretion. Submissions claimed that courts often misuse their discretion to determine whether an interpreter is needed.⁷¹⁰ Their decisions appear to be based on whether they can understand what is being said to them, rather than on the woman's need to understand everything that is said to her and to convey all she wishes to say. Courts fail to understand that, while a woman may have sufficient colloquial knowledge of English to answer routine questions, the language of the courtroom may be incomprehensible to her. The legal system may also be a particularly intimidatory place in which to discuss personal matters. In a difficult situation anyone's fluency in another language slips. The Commission was told by ethnic community workers of cultural inhibitions which constrain women from seeking assistance.

*A Vietnamese woman had not requested an interpreter as she felt this would be asking too much. During her testimony, the Magistrate made his frustrations known by exclaiming he could not understand her English. Rather than adjourning the case to another date he proceeded to request that the woman 'act' out the nature of the violent behaviour. Whilst attempting to respond to this totally unreasonable and humiliating request there was an outburst of laughter in the courtroom. Although the woman was granted the order, she spoke of her feelings of being treated like an 'animal', rather than a human being.*⁷¹¹

*A Filipina woman who was sexually assaulted by her employer was cross-examined for six hours during a committal hearing. 'The manner of questioning was hostile, intentionally aiming to confuse her and abuse her language difficulties.' The court did not provide an interpreter as it deemed her English sufficient. The matter did not proceed to trial as it was considered that there were too many inconsistencies in her evidence.*⁷¹²

A Croatian woman seeking a domestic violence order was mistakenly provided with a Serbian interpreter. The woman refused to speak to the interpreter as she strongly believed that this would

*compromise her in the eyes of her Croatian community. The Magistrate responded by stating that 'international conflicts should not be brought into the arena of the Australian courts'. He suggested that, if she could not use the services of an interpreter, then quite clearly this indicated that she was not in desperate need of an order.*⁷¹³

A statutory right to an interpreter in court

7.11 Recommendations in ALRC 57. ALRC 57 made a series of recommendations on the provision of interpreters in court.

- The *Evidence Bill 1991* (Cth) cl 34 should entitle a witness to give evidence through an interpreter. The provision should apply to all prosecutions of federal offences until uniform evidence provisions are introduced in all States and Territories. Only professional interpreters should be used to interpret in a criminal trial and the cost should be borne by the Commonwealth.⁷¹⁴
- A person accused of a federal offence who does not understand English well enough to understand what is said in the court should be entitled to an interpreter to interpret for him or her the whole of his or her trial, whether or not he or she chooses to give evidence. The cost is to be borne by the Commonwealth.⁷¹⁵
- The federal government should consider establishing a fund to pay the cost of interpreters in civil proceedings in cases of hardship where the party is not legally aided.⁷¹⁶
- The Family Court should actively recruit bilingual staff at all levels and provide interpreters for counselling, mediation, conferences and hearings, to be paid for by federal funding to the Family Court for that purpose.⁷¹⁷

The last recommendation, on the Family Court, has been implemented but the others have not.⁷¹⁸ The *Evidence Bill 1993* (Cth) cl 30 contains a provision in the same terms as the draft 1991 Bill on which the comments in ALRC 57 were based.⁷¹⁹ The provision is also mirrored in the NSW draft legislation.⁷²⁰

Recommendation 7.2

The Commission affirms its recommendations on interpreters in its report on *Multiculturalism and the law*.

7.12 Recommendations extended. The Commission considers on the basis of the evidence presented to it in the course of this inquiry, that further measures are required to protect the rights of women of non-English speaking background who come to court.

7.13 The right to give evidence as a witness through an interpreter and the right to have the whole proceedings interpreted should be extended to women seeking apprehended violence orders in domestic violence matters. Because of the seriousness of domestic violence, where a woman's safety and, in some cases, life may be threatened, she should be entitled to the same rights in court as a defendant in a criminal case. The right to life and freedom from physical abuse must be treated on a level of seriousness with threat to liberty. The Family Court provides interpreters for all matters, including injunctions. This entitlement should not be denied because a matter is in a State or Territory civil jurisdiction.

Recommendation 7.3

In matters involving domestic violence a women should have a statutory right to appropriate interpreting services when giving evidence and to understand the whole proceedings. The cost of the interpreting service should be borne by the court.

7.14 **Cost.** All courts, both federal and State, meet the cost of an interpreter if the judge determines that an interpreter is necessary. Similarly, the police arrange for and meet the cost of an interpreter for interviews or court appearances if they consider an interpreter necessary. Legal Aid Commissions provide interpreters where necessary and meet the cost from the grant of legal aid. Interpreters provided pursuant to a statutory right should be provided at no cost to the witness or party. The cost should be borne by the court or the police, as appropriate. Additional allocations to the courts and the police may be necessary to enable them to meet the costs.

7.15 **Obligation to inform about free interpreters.** Even where specific funding for interpreters has been set aside, women may not be aware of the availability of the interpreters. This seems to be the case in the Family Court.⁷²¹ The Family Court policy guidelines on the use of interpreters state that free interpreters are available for all matters.⁷²² However, there is no obligation to inform clients of their availability. The clients may have to initiate the process, which will be difficult if they believe they will have to pay the cost. Women are entitled to be informed of their right to use an interpreter, especially if this right is a statutory right. Court officers should be obliged to inform women of this right.

Recommendation 7.4

The Family Court should include in its policy guidelines on interpreters a requirement that its clients be informed of their right to an interpreter and the availability of free interpreting services provided by the court.

Quality of interpreting services

7.16 **Appropriate services.** Male interpreters are inappropriate in some situations, particularly in domestic violence and sexual assault matters.⁷²³ The Commission was told of inappropriate male interpreters imposing their own judgments on women applying for orders against their husbands.⁷²⁴ For example, they may tell the women to return to her husband or adopt an aggressive or dismissive tone towards the woman. One submission recommended that female interpreters should be provided on request and that information about this choice should be widely circulated.⁷²⁵ Administrative Appeals Tribunal guidelines require an indication of whether a male or female interpreter is preferred and this is to be taken into account where the Tribunal is responsible for booking an interpreter.⁷²⁶ Anecdotal evidence suggests that existing services are usually able to provide a female interpreter when a booking officer requests it.

7.17 **Use of unqualified people.** Unqualified people such as family members, friends and court staff are often asked by police and magistrates to interpret.

*A Greek woman returning to court for a full intervention order was denied a request for an interpreter on the basis that the Magistrate believed her sixteen year old daughter could interpret for her. He was not prepared to adjourn the matter to another date. The woman spoke of her feelings of humiliation in having to interpret through her daughter, and as a consequence withdrew her application.*⁷²⁷

According to the Family Court's guidelines, staff are advised to use friends of the client or registry staff who speak the relevant language in preference to accredited interpreters. This may be necessary if an accredited interpreter is unavailable but the use of unqualified people raises many problems for women.

7.18 An unqualified or inexperienced person may be intimidated by an aggressive defence lawyer and consequently interpret incorrectly.⁷²⁸ Conflicts of interest may also arise, for example, where an interpreter is asked to interpret for both parties to an action. Interpreters must be qualified and familiar with the legal system, particularly in more sensitive cases such as domestic violence and sexual assault.⁷²⁹

7.19 **Interpreters and the court charter.** In its Interim Report, the Commission recommended that federal courts and tribunals and other courts exercising federal jurisdiction develop a court charter to promote greater public confidence in the courts and a more accessible justice system. It should provide, for all those

coming to court, information about court processes and facilities, including the availability of child care, likely waiting times and court personnel available to provide information. The Access to Justice Advisory Committee made a similar recommendation.⁷³⁰ Courts should include in the charter clear guidelines for the use of interpreters in court.

7.20 Training for police and legal professionals. Police and legal professionals should be trained in communicating through interpreters. In consultations, the Commission was told that police, legal practitioners and the judiciary often fail to use the interpreter properly to facilitate communication. This results in further alienating the woman concerned.

7.21 Training for interpreters. The Access to Justice Advisory Committee reported that there was clearly a need for mechanisms to ensure the competence of interpreters.⁷³¹ Interpreters working in the legal system should receive specific recognition as legal interpreters. They should receive special training on dealing with domestic violence matters. Interpreter services should provide a list of specialist domestic violence interpreters. The National Accreditation Authority for Translators and Interpreters is currently developing a model registration and accreditation system.⁷³²

Recommendation 7.5

The funding of training courses for interpreters should be increased to ensure that interpreters reach a competent and accredited level. All interpreters should receive gender awareness training and interpreters working within the legal system should be accredited as specialised legal interpreters.

Child care facilities

Lack of child care facilities

7.22 Women are usually the primary carers of children. Their ability to use the legal system often depends on their ability to obtain child care. Child care responsibilities can make it difficult for women to attend appointments with lawyers.⁷³³ Many submissions highlighted the lack of child care services at most courts.⁷³⁴ Courts lack private areas for feeding or changing infants and children's play facilities.⁷³⁵ The length of cases is often unpredictable, and times and dates for hearings may change. Many women who are seeking protection orders or involved in children's court matters do not have the social network or financial resources to arrange child care. This is especially true in urgent cases, such as applications for restraining orders. Occasional child care may be very expensive, difficult to arrange at short notice and only open for short hours, making it difficult for women to take their children and pick them up if they are required in court all day. Women involved in long and protracted legal proceedings face acute difficulties with child care.⁷³⁶

*The courts are not child friendly and women report feelings of disapproval from court officials and others. School children are dismissed at 3pm, the mother will still be attending the court, she will have to make arrangements for child care. It is not unknown for women to have approached Emergency Relief agencies for financial assistance with this. Another issue that arises is that women who experience domestic violence abuse are often deliberately isolated from normal supports (family and friends) by the abuser. This is a fairly common experience, so that women may not have anyone to turn to.*⁷³⁷

Adverse effect on instructions and evidence

7.23 The additional stress caused to a woman by problems with child care may have a damaging effect on her capacity to instruct her lawyer and give evidence in court.

It is not unusual for a woman to be trying to control a fractious child while a magistrate is making

*decisions about the care and control of her child, or passing sentence.*⁷³⁸

Standing applications down and listing procedures

7.24 Courts often fail to acknowledge the child care responsibilities of women, for example, in standing an application down to a later time in the day without consideration of the woman's child care arrangements.⁷³⁹ The Commission was told of one incident where a magistrate said at 10 am that he would have to stand the application for a restraining order down to 12.30 pm. The applicant mother burst into tears because her child care arrangements ran out at noon.⁷⁴⁰ Another issue raised is the listing procedures of local courts.⁷⁴¹ In local courts, all matters are often listed at 10 am, which means that witnesses, defendants and parties to an action may have to wait all day. It was suggested that this could be easily solved by listing matters for morning or afternoon or scheduling times.⁷⁴² It was also suggested that the conduct money witnesses receive to cover reasonable costs should include child care expenses where the court does not provide facilities.⁷⁴³

The response of the legal system

7.25 Courts have traditionally been slow to recognise women's responsibility for child care and the effect this has on their ability to pursue their rights in the justice system.

*When a new court complex was built in Darwin two years ago, some of the latest technological innovations were included. For example, provision was made for some courts in the complex to take evidence through closed circuit television. The issue of child care facilities was raised as a need of many of the people who would be using the court. This is particularly relevant in Darwin, because for many people the usual family networks for child minding are not available as relatives are down south. The suggestion was dismissed as impractical because it would involve horrendously difficult issues such as the provision of small toilets. Consequently, [there is] no provision for child minding for parties or witnesses.*⁷⁴⁴

Recommendation 7.6

All courts exercising federal jurisdiction should provide access to child care facilities, either on site or through arrangement with a local child care centre. Facilities should include full time, affordable child-minding services, play areas and suitable toilet and changing facilities. Capital works funds should be provided for capital works to address existing deficiencies on the basis of need. When new courts are built or old ones refurbished, child care facilities should be included.

Changing court culture to protect women's privacy and dignity

Separate waiting areas

7.26 Many women find waiting areas and conference areas in courts inadequate.⁷⁴⁵ While this affects all clients of the courts, it has particular implications for women who have suffered violence. They may be forced to wait in the presence of the perpetrator or to discuss sensitive matters in crowded public areas. For example, one submission described how at the Family Court in Darwin women who fear further violence from their partners or ex-partners often wait in the toilets because the perpetrator is in the only waiting and conferencing area.⁷⁴⁶ These situations can be very threatening and traumatic for the women involved. They are also potentially dangerous. The Commission also heard that, even where areas have been set aside for conferences, such as for the Legal Aid domestic violence duty solicitor service at the Magistrates Court in Canberra, court facilities are so overstretched that problems of confidentiality and privacy arise because of the limited space.⁷⁴⁷

Recommendation 7.7

Adequate separate waiting areas and conference areas should be provided to ensure that women are not placed in fear by close proximity with the alleged perpetrator of violence and that they have adequate opportunity to discuss personal matters with their lawyer or support person in private.

Masculine and formal culture

7.27 Many submissions described the culture of the courtroom as masculine and formal and alienating for many women.⁷⁴⁸ Most judges, prosecutors, lawyers and court officials are men. Room layout is formal and intimidating. Courts also have many legal formalities and rituals, such as the wearing of wigs and gowns. While these are matters that affect all people coming to court, it was suggested that they have traditional and patriarchal connotations which subtly deter many women.⁷⁴⁹

Sexual assault victims

7.28 The court culture can be particularly intimidating for a woman who must give evidence of traumatic events such as sexual assault. The experience is often worse for Aboriginal and Torres Strait Islander women, who may be shy of white people and easily intimidated by authority figures and in whose cultural background sexual matters are not discussed in mixed company, let alone before open courts.⁷⁵⁰ Many women say that, because of the adversarial nature of proceedings, they feel they have been raped twice. They feel *they* are on trial, rather than the offender.

*. . . the court isn't around to see how devastated these young women are after being subjected to hours of cross examination and humiliation for daring to report a violation they have suffered.*⁷⁵¹

A child psychologist observed:

*. . . for some reason it's different when a boy comes to court as the victim of sexual assault. There is a certain outrage about what has happened, and he doesn't face the same credibility gap as a young woman.*⁷⁵²

In a recent court case an eleven year old girl, who had been raped by a family friend at the age of eight, was forced to stand through three hours of cross examination because she was

. . . she was too small to be seen over the witness box . . . During this time, no-one offered her a glass of water, a rest, a higher stool . . . no-one offered her a screen so that she would be shielded from view of her attacker. Defence counsel objected to her mother being her support person.

*The cross examination was terrible - they treated me like I was nothing . . . The barrister was asking me terrible questions. He asked me if I talked about sex with my friends at school . . . It made me feel like the night that it happened again . . . I had my teddy, and I kept pinching myself to stop myself from crying.*⁷⁵³

The inhumanity of the court culture and environment in such cases is clear.

Strategies for reform

7.29 ***Many ways to support.*** There are many ways to protect the dignity and privacy of a woman who must give evidence and provide support for her:

- the provision of a support person of the victim's choice, who is allowed to sit near or next to the victim
- more contact with prosecutors
- closing the court while the woman is giving evidence
- allowing screens or other barriers to be erected between the victim and the defendant, or ensuring in other ways that he is out of view
- allowing the woman to give evidence by video so that she is not confronted by the perpetrator.

Maria was sexually abused by her father at the age of 15 years 2 months. The matter was eventually heard at Penrith Court in March 1994 at which time Maria was 16 years 8 months. Initially she had been informed by the Director of Public Prosecution that she was entitled to closed circuit television when presenting evidence as she was terrified of her father and could not face him in open court. Maria's father and his solicitor objected on the grounds that as she was now over the age of 16 years she was not entitled to closed circuit facilities. Very reluctantly and despite serious misgivings, Maria wanted to appear to have her story believed. Subsequently she was offered a plea bargain by her father's QC and barrister whereby she would not have to take the stand. Maria said she did not understand the term plea bargain nor were the consequences adequately explained to her. She was told that this was a normal part of the process which would result in the court finding her father guilty. Maria's father did plead guilty to an offence but to a lesser one of common assault receiving only a \$1000 fine and a two year good behaviour bond. Maria and her family felt betrayed. She is adamant that she would never again report an incidence of sexual assault because of the ongoing trauma. She believes she was not provided with sufficient or accurate advice from the prosecutor about her options and the denial of the closed circuit evidence removed her only protection from facing her father and being able to openly speak about what happened to her. The fact that justice was not seen to be done highlights the need for adequate protection and support in the court.

7.30 Support person. Permitting a support person for victims before the trial and while giving evidence may alleviate the intimidating and alienating effect of the court room.⁷⁵⁴ Many courts have some form of court support system, particularly for victims of domestic violence. Many of these systems rely on volunteers and do not provide legal assistance.

7.31 Closing the court. The prospect of giving evidence about sexual assault to the jury, judge, lawyers and court personnel is daunting enough, particularly for Aboriginal women, without also being exposed to public view. One submission described a recent sexual assault case in Alice Springs where an Aboriginal woman was forced to give her evidence and undergo cross-examination before approximately twenty high school students.⁷⁵⁵ There is legislation in several States and Territories to permit the courtroom to be closed where children and special witnesses are giving evidence.⁷⁵⁶ However, this protection does not extend to all jurisdictions or even all courts; for example, in the Northern Territory the provisions allowing the court to be closed cover committal proceedings but not trials in the Supreme Court.⁷⁵⁷ This anomaly clearly needs to be addressed.

7.32 Giving evidence. Submissions to the Commission referred to the stress caused to women giving evidence in being forced to face the perpetrator. The Commission heard evidence of the particularly distressing effect of being cross-examined by the alleged offender in a personal violence or criminal compensation case.⁷⁵⁸ Women may be directly threatened or intimidating sign language may be used in the courtroom by an offender on his victim.⁷⁵⁹ At the very least, screens could be provided to remove the offender from the victim's line of vision while she gives evidence.⁷⁶⁰ This is already possible in some courts.⁷⁶¹ Having the offender out of sight eases the strain on the victim and can give a woman confidence that she is being listened to.⁷⁶² Another option is the use of video evidence. Schemes whereby children in sexual assault proceedings may give evidence by video should be extended to other victims of sexual assault on an optional basis.⁷⁶³ These simple mechanisms can be an important way of providing women with better justice. They should be considered by all States and Territories.

Recommendation 7.8

The Commonwealth through the Standing Committee of Attorney's General should encourage States and Territories to ensure that statutory provisions

- **permit the use of support persons in court proceedings**
- **provide for closing the court**
- **providing screens or close circuit television for witnesses**

in all case in which witnesses may suffer emotional trauma or be intinmidated or distressed or unable to give evidence by reason of the subject matter of the evidence, particularly in domestic violence and sexual assault cases

The support person should be of the witnesses' choice. This person should be allowed to sit in close proximity to the witness while she gives evidence.

PART IV - VIOLENCE AGAINST WOMEN

8. Violence against women

Introduction: how this report discusses violence against women

8.1 This chapter introduces the discussion of legal responses to violence against women. It provides the context for the more detailed examination of those legal issues to which the Commonwealth can respond. Its objective is to show the many ways in which violence is relevant to legal disputes, even where it is not the direct issue and even though it is often ignored. First, it discusses examples of different legal remedies that have been, or might usefully be, invoked in cases in which violence is the central issue, the reason for bringing the legal action. The examples illustrate briefly the possible role of areas of law other than criminal or quasi-criminal law. The chapter presents examples of cases where, while the legal issue before the court did not directly involve violence, the judgment reveals that it was an underlying factor in the case. In these examples violence was not a focus of the discussion in the case but it emerges clearly from the judgment. In the following chapters the Commission discusses violence against women in relation to two important areas of federal responsibility; family law and immigration law.

Violence and the law

The rule of thumb and its legacy

The gravity, indeed the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her. One need only recall the centuries old law that a man may beat his wife with a stick "no thicker than his thumb".⁷⁶⁴

Laws do not spring out of a social vacuum. The notion that a man has a right to "discipline" his wife is deeply rooted in the history of our society. . . . Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.⁷⁶⁵

8.2 As chapter 2 explains, violence by men against women is a longstanding problem and remains widespread.⁷⁶⁶ Until recently it was sanctioned by the law's indifference. While it may not be possible to envisage a complete and comprehensive legal response to violence, either by the Commonwealth or the State and Territories, the level of tolerance of it in different areas of the law needs to be examined and addressed. A brief reading of judicial decisions across a range of different legal issues shows that violence is quite often a part of the background or context of a legal dispute but it is either ignored or treated as irrelevant. This is not to say, however, that courts always ignore or miss the violence in cases involving domestic relationships when the case is not one legally classified as 'about violence'. Indeed, the cases discussed below indicate that courts can respond to male violence against women. However, it was obvious from the response of women to the Commission that such judicial sensitivity to issues of violence was by no means uniform.

Gender bias and the judiciary

8.3 The Senate Standing Committee on Legal and Constitutional Affairs has recently examined the issue of gender bias in the judiciary. Its May 1994 report concentrates on issues of sexual violence against women.⁷⁶⁷ The Committee found that stereotypes deriving from historical, social attitudes which did not accept women's status as equal, autonomous citizens continue to be used.⁷⁶⁸ While the Senate Committee focused on particular cases of sexual assault that had received widespread media coverage, they suggested that it was not an adequate response to the issue of gender bias merely to hold individual judges responsible. They saw the problem a real, significant but largely unconscious problem of a systemic nature calling for multiple solutions.⁷⁶⁹

Violence and legal education

8.4 In traditional legal education, violence against women is not typically a subject in the law course in its own right nor, more importantly, is it a topic in a general compulsory course such as property law, contract, equity or administrative law. While it is an essential and comparatively visible part of criminal law in courses in Australian law schools, it should also be a prominent part of all traditional law subjects. Violence is often part of the context of a case, or essential to understanding the dispute between the parties, even while it is not the central focus of the case. The federal Department of Employment, Education and Training (DEET) has recognised this by providing funds for the development of course materials on key thematic areas, including violence, for inclusion in core subjects within the law curriculum.⁷⁷⁰

Violence extends beyond the criminal law

8.5 As a result of the ways in which legal categories are structured, there is a tendency to see violence as relevant only to the criminal or quasi-criminal law, largely the responsibility of the States and Territories, and not to consider it as having any relevance to a range of other non-criminal law issues. There may well be a tendency not to recognise it at all in other areas. There has been considerable law reform effort in Australia around criminal law issues such as rape and sexual assault, violence by men against women in the home, child sexual abuse and homicide laws. The focus has been on male violence against women in its clearest and most direct forms. This work, evident in the reports of various task forces, committees and inquiries, including the National Committee on Violence Against Women, has been essential to make violence against women a more prominent concern in traditional criminal law. There has been much less attention to violence which arises less directly in the law and may take other forms. For example, women are subjected to a variety of different injuries. They may be harmed in their workplaces and the streets by sexual harassment. They may be vilified or infantilised or sexualised in media representations. They may be harmed in a seemingly infinite variety of forms of pornography. They may also be injured through medical abuses, particularly in relation to their reproductive capacities.⁷⁷¹ As young women, they may be distinctively harmed by the juvenile justice system.⁷⁷² Abuses against women are perceived as a 'by-product' of war.⁷⁷³ Yet male violence against women is routinely ignored outside criminal or quasi-criminal areas.

Legal responses to violence against women

A range of responses

8.6 The law can respond to violence against women in a number of different ways, as an examination of violence against women in the home illustrates.⁷⁷⁴ These responses include enforcement of existing criminal laws, such as the law of assault; resort to quasi-criminal laws, such as the use of protection/restraining/apprehended violence orders; the use of administrative law remedies, such as a writ of mandamus to compel police to exercise their powers under the criminal law in appropriate cases; injunctions under the *Family Law Act 1975* (Cth) or under laws such as the *De Facto Relationships Act 1984* (NSW); tort law; criminal injuries compensation legislation; and the equitable doctrine of breach of fiduciary duty, which focuses on the abuse of power inherent in some instances of violence.⁷⁷⁵

The broader use of tort law

8.7 **Existing torts.** There have been some successful attempts to address violence in the area of tort law, or civil wrongs. Actions for negligence have been brought in cases where the defendants have breached their duty to protect women at foreseeable risk of violence. Examples include an action against the police for failing to protect women against a known rapist and actions against landlords for failure to protect tenants from rape and other forms of assault.⁷⁷⁶ Negligence actions are potentially available against any body or person with a responsibility to protect the community or provide a safe environment, for example, a school or university, an occupier of a public building, or perhaps a local government authority with responsibility for street lighting. The tort of trespass to the person, which includes assault and battery, has also been used directly against perpetrators.⁷⁷⁷

8.8 **Developing new torts.** Tort law may also have the potential to develop other responses to violence. For example, in the UK there is currently debate over whether the law relating to nuisance and the tort of

intentional infliction of emotional distress⁷⁷⁸ can deal adequately with harassment or whether a new tort should be developed.⁷⁷⁹ Tort law could develop 'a category *sui generis* for injuries suffered by individuals because they are women', using the understanding of social injury.⁷⁸⁰

A new framework

8.9 There are many possible responses to the problem of violence against women and a variety of legal doctrines in which violence emerges as an issue. A complete legal response to violence might require a substantially reconstructed legal framework with a new category solely for the purpose of dealing with violence against women in all its forms. This is beyond the scope of what can be achieved in this reference.

Violence against women in case law

The emergence of violence against women

8.10 In many cases violence against women may not be the issue before the court. However, a history of violence may emerge from a discussion of the background of the case. It can become a central part of the context of the case. The first three examples below form a case study of how aspects of the non-criminal law respond to 'domestic' homicide.⁷⁸¹ These and the other examples here show how, by examining violence against women only through criminal or quasi-criminal law, its extensive incidence and effects in other legal and social contexts can be easily overlooked. The examples may also illustrate the link between violence and women's economic inequality.

Homicide and violence outside the criminal law

8.11 ***Equity: undue influence.*** A recent case illustrates the ways in which disputes can arise from transactions which took place in the context of a violent relationship.⁷⁸² In *Perks*, the legal issue concerned whether a memorandum of transfer of a property interest from a wife to a husband was void as having been executed under duress or as a result of his undue influence. The defendant, the husband, had been convicted of murdering his wife and the action was brought by her executor.⁷⁸³ In evidence, detailed accounts of the history of his violence towards her were given, including evidence from their children and a family friend.

8.12 The sons gave evidence of extreme brutality. Evidence from a family friend attested to a slightly different aspect of the attitude of the husband to the deceased wife. According to this witness, the husband had 'declared on more than one occasion that a woman should not own more land than her husband, that it wasn't fair, wasn't right'. He had said this in the context of demanding that she 'square up' and 'sign on the dotted line'.⁷⁸⁴ This suggests that the husband could not accept his wife's ownership of a share in the property as a proper role for a woman. The trial judge found:

Of course, the history of violence which I have summarised and which I find proved is only one step in establishing the plaintiff's allegation of undue influence in the transaction under consideration. . . . I find that the defendant subjected the deceased to violence and abuse which was so much a part of everyday life in the household that the children did not regard it as unusual until they discussed it in later years with friends at school. The only conclusion I feel able to draw from the deceased's decision to remain with the defendant over the years is that she too came to accept it as part of her everyday life. In my view, the defendant dominated his wife by the constant employment of actual and threatened violence and it is against this background that the events more directly concerned with the transfer of her share in the property fall to be considered.⁷⁸⁵

The judgment reveals that Mrs Perks was oppressed by her husband physically, psychologically and economically. Duggan J held that the memorandum of transfer was void as it had been executed in the context of undue influence.

8.13 ***Succession.*** One of the best known legal aphorisms is 'no man (sic) shall profit from his own wrong'. A common example given of this is the rule that a person cannot benefit under the will of someone that person has killed.⁷⁸⁶ However, the circumstances of some homicide cases, in which women have killed their husbands after a long history of abuse, have confronted some courts with the dilemma of how to apply this principle. For example, in *Re Keitley*, the Supreme Court of Victoria was confronted with an application for probate by a woman named in her husband's will as his executor who had pleaded guilty to manslaughter.⁷⁸⁷

The judge noted that he had before him materials from the criminal proceeding, which demonstrated that the relationship involved violence or threats of violence directed by the deceased to his wife.

The cumulative effect of the deceased's behaviour was to engender in his wife a very real and understandable fear of him.⁷⁸⁸

After reviewing a number of authorities concerned with the principle, the Court decided, in view of its finding that her level of moral culpability was markedly diminished, that this was not a case in which the rule should operate to prevent the granting of probate.⁷⁸⁹ Similarly, in the NSW case *Public Trustee v Evans*,⁷⁹⁰ the Court decided that the forfeiture rule should not apply where the applicant had been subjected to a prolonged history of violence prior to the killing.

8.14 Family law. Some recent family law cases illustrate starkly how violence against women in its most extreme form, homicide, can be integral to the consideration of a legal issue outside the criminal law. *Homsy v Yassa and Yassa*; the Public Trustee concerned a dispute about matrimonial property. The parties had separated in November 1986, when the deceased wife gave birth to their second child. Property proceedings had commenced in 1987 and were not finalised when she was killed by her husband, in the presence of the child, in May 1988. The husband pleaded guilty to manslaughter on the grounds of diminished responsibility and was sentenced to 12 years' imprisonment.⁷⁹¹ He was released on parole in November 1992. In 1993, the property matter came back before the court, with an access dispute, under Family Law Act s 79(8) which sets out the circumstances in which property proceedings may be continued after the death of one of the parties. The husband argued that his former wife had been a schizophrenic and that this had diminished the value of her contribution to the property under s 79 of the Act, a submission which was rejected by the Court.⁷⁹² He also argued that s 75(2), which deals with the needs of the parties, should be relied on to award him a greater share of the property than he would have received solely by reference to the respective contributions of the parties. As the trial judge put it:

In essence, though not put this way by his counsel, the Applicant maintains that he has needs for accommodation, that he has health problems, that he has limited or no capacity to be employed for a variety of reasons relating to his health and his criminal record, and that, in all the circumstances, Section 75(2) should operate to increase his entitlement beyond that which he achieves by contribution. I do not accept that this is so. In my view, the Applicant having terminated the life of the deceased, and thereby rendering inappropriate Section 75(2) factors which previously significantly favoured the deceased, cannot himself have the benefit of those factors. To do so would be offensive to justice and equity, whether that is considered in the context of Section 79(2) or Section 75(2)(o) of the Act.⁷⁹³

8.15 The response of the courts in the homicide case study. Violence frequently emerges in contexts where it may be unexpected. It is rarely characterised as a legal issue outside the criminal or quasi-criminal law even though the factual issue may be very relevant to the case and even though courts have acknowledged that relevance. These three examples show that some courts have been prepared to take violence into account in their consideration of other issues.

Personal injury damages

8.16 Taking account of violence. Violence may also emerge as an issue in the relatively common circumstance where women are involved in providing care for their partners or other family members injured in accidents. This may occur more frequently than the case law would indicate.⁷⁹⁴ One reported decision from South Australia provides a clear illustration.⁷⁹⁵ The plaintiff had been injured in a motor vehicle accident in which he suffered brain damage, one consequence of which was that he became violent. His wife, the carer, for whom this was a constant threat, had developed a number of strategies for dealing with him. The court described her day-to-day life with him as requiring 'quite heroic stamina and tolerance from her because his brain damage has rendered him most difficult to live with'.⁷⁹⁶ Although by the time of trial, incidents of the violence or threats of violence toward his wife were less frequent, the court noted that she may yet leave him because of his violence: 'the one thing she will not now tolerate is violence from the man whom she has cared for and nursed so devotedly'.⁷⁹⁷ The judgment, however, infers this is of only limited relevance for the court. It appears that the court mentioned the violence only in relation to the possible future contingency that the wife may not at some time in the future be available to provide the care and, therefore, this should be provided for in the damages.

8.17 *Compensating for the costs of care*. The current conceptualisation of damages for the costs of care⁷⁹⁸ may leave out of account the impact on the carer.⁷⁹⁹ Under current principles damages are paid for the plaintiff's care needs arising from the accident rather than for the care provided by the carer.⁸⁰⁰ While the primary accident victim may have her or his loss of amenity assessed and compensated, no similar damages are available to the carer, who may, however, suffer the most significant loss of amenity. It may be appropriate in a case such as the one discussed to include a component of damages to compensate others, such as the wife/carer, for the consequences of the violence.⁸⁰¹ It is beyond the scope of a reference on federal law to make recommendations on reform of personal injury damages.

Social security

8.18 A co-ordinated response to domestic violence requires a rethinking of, among other things, housing and social security policies.⁸⁰² In the context of social security, a history or current fear of violence may arise as an issue in a number of ways. For example, a sole parent may not wish to pursue child support from her former violent partner because she is in fear of him. This is a matter which has been recognised by the Department of Social Security in its guidelines as forming a valid basis for an exemption from the obligation to pursue support from her ex-partner.⁸⁰³ Alternatively a woman may be overpaid entitlements as a result of pressure by a male partner to make a claim to which she is not entitled.⁸⁰⁴ It has also been suggested to the Commission that women who fear violence from their ex-partner may be more likely to plead guilty when confronted with criminal charges relating to overpayments, which may themselves flow from the violence by a partner. In one case recounted, a woman had pleaded guilty as she believed that this would prevent her ex-partner from finding her. It was suggested that if she had been prepared to plead not guilty and the matter gone to trial, she would most likely have been acquitted.⁸⁰⁵ It appears that there may be many situations in which men's violence against women (and children) may be central to the context of a case but not formally be an issue for decision. The Department of Social Security is preparing guidelines for staff on dealing with clients who are the targets of violence. However, this recognition of the impact of violence on clients has not been incorporated into the legislation which governs entitlements.⁸⁰⁶

Conclusion

8.19 Violence is a part of the background to many legal disputes, even though it is less frequently the central issue before a court or tribunal. The examples above are merely illustrations. Many others could have been chosen to make the same point.

8.20 Other areas of federal law which warrant some further scrutiny in this context include banking and insurance,⁸⁰⁷ and the now well-recognised phenomenon of 'sexually transmitted debt', or unconscionable guarantees;⁸⁰⁸ customs law regulating the importation of pornography and other material which is violent or contributes to the maintenance of women in a position of disadvantage; broadcasting law and the ways in which vilification of women is dealt with; employment law and the centrality of sexual harassment as an occupational health and safety issue.⁸⁰⁹

9. Violence and family law

Introduction

9.1 This chapter examines the treatment of violence against women in family law. It discusses how the 'no fault' philosophy has permeated the jurisprudence of the Family Court and prevented relevant issues from being raised. It proposes a series of amendments to the Act and some changes to procedures and practices within the court system. It also recommends that the National Women's Justice Program take up some issues arising under State law.

Violence in relationships

Violence is an underlying issue in family law cases

9.2 Many women come into contact with the law and the legal system through a family law matter. Because the incidence of violence in marital and comparable relationships is so high the Family Court of Australia is more likely to encounter women who have been the targets of violence than any other court, except perhaps, Magistrates (or local) Courts.⁸¹⁰ Violence forms a backdrop to many of the cases that come to the Family Court, such as custody and access matters and property disputes. The Commission received many submissions that evidence of violence against a spouse is often excluded or discounted at different stages of the legal system and that the Family Court often does not give proper weight to the existence and effects of violence.⁸¹¹

9.3 **Myths about violence against women in relationships.**⁸¹² Despite research which describes and analyses the nature of domestic violence, there still appears to be an inadequate understanding of the dynamics of an intimate relationship characterised by violence. This lack of understanding extends to many police officers, lawyers and judges. Beliefs persist that violence is a problem of the relationship rather than the problem of the perpetrator, that it will end when the relationship ends and that the perpetrator's acts are 'out of character' and therefore deserving of sympathy. One view especially damaging to women is that 'it takes two to tango'. This implies that the woman must have provoked the man's violence and therefore is able to stop it by changing her behaviour.⁸¹³ It focuses on the woman, not on the violence or the perpetrator of the violence and it ignores the law's responsibility to protect against violence and to hold the perpetrator accountable.

9.4 **The nature of violence against women in relationships.** Violence is used by a man as a means to exert power and control over his female partner.⁸¹⁴ Violence is not only physical but extends to verbal, emotional, psychological, sexual and financial abuse.⁸¹⁵ This was reflected in submissions to the Commission.

I was married to my husband for 19 years. We lived in 11 different homes and in that time and each place I was physically abused. The abuse would be kicking, punching, shoving and pushing severely, back handed hits, tearing hair out . . .

No-one was aware of what was really happening behind our closed doors and we were looked upon by friends and outsiders as the perfect couple. He was well thought of as a father and husband in public . . . Gradually . . . I began to notice he had become more aggressive towards the children, especially my son . . . As the violence had become more frequent and more violent my husband had become even more obsessed with everything being done his way. It didn't matter what we did right or wrong he punished us for any reason and any excuse.

Apart from all the physical abuse my husband is extremely manipulative and charming. He is very clever in his dealings with people and always gets what he wants. We were subjected to a lot of emotional abuse over the years. We have been separated for nearly two years now and he continues to harass and frighten us. I have spent \$4000 on restraining orders, it is too dangerous for me to defend myself, and he continues to breach restraining orders whenever it suits him.

*For the last two years before separation my husband began laughing at us when he was beating us.*⁸¹⁶

The abusers are very clever. They usually have moved you away from your support system, sometimes to isolated areas. They usually hold the purse strings that make you financially dependent on them. You're so brainwashed you can't reason or think clearly because the thoughts you have are stupid (he tells you) compared to his. You don't dare tell anyone maybe because you're too frightened of the violence or abuse that might follow . . . Unless you have been through it, you could not imagine in your worst nightmare what it's like.⁸¹⁷

Men who are violent have to have power and control over their partners and children and these men define their families' world for them and it is controlled by violence. The violence can be physical, emotional, verbal, psychological, sexual, financial and also includes forced isolation from family and friends.⁸¹⁸

9.5 Abuse of court proceedings. Several women said that their partners or former partners abused court processes through repeated applications for variation of existing orders for access or maintenance.⁸¹⁹ These applications reflect a continuing attempt to exert power and control and prolong the abuse the woman has suffered during the relationship.

There was and is a great need to protect my daughter. We went through 11 hearings, false allegations, abuse and violence occurring when access took place (when I was convinced by [the] lawyer to "send her and see what happens"). My ex-husband started the proceedings (as he has done previously to other people) of access/custody. One working day prior to trial he withdrew. He can start access again at any time, and has indicated he is intending to do so in letters. All I have is my daughter's true wish not to see her father and information of years of violent abusive relationships I cannot get into court.⁸²⁰

The President of the Family Law Practitioners' Association in one State commented in relation to custody and access matters

I have seen too many instances of the Court's power being used by abusive husbands as a means of perpetrating their power and control over their wives.⁸²¹

Effects of violence against women

9.6 Disempowerment. Violence directly impedes women in enforcing their legal rights through its destructive impact on their personal confidence and because they may fear retaliation. The Commission heard that the need to escape from extreme forms of domestic violence often led a woman to decide not to pursue her right to a share of the matrimonial property.⁸²² This obviously contributes to the greater poverty women experience after divorce.⁸²³ Fear of violence may also affect a woman's decisions about custody and access matters.

In 1992 I dropped the custody application for my eldest son. It had become obvious to not just me but the solicitors involved, including my husband's solicitor, that if I were to obtain custody of that child my husband would very likely kill me. I settled for access orders and a property settlement. I settled for less money than I was entitled to, to avoid losing most of it in legal fees. My husband ignored the access orders, continuing to deny me access to my eldest son . . .⁸²⁴

The devastating effects of domestic violence on women's self-esteem have been widely documented⁸²⁵ and were described in many submissions to the Commission.⁸²⁶

The non-physical abuse we call 'bruises on the inside' and when you live with someone who

constantly criticizes you and never gives you praise, it undermines your self esteem so that you feel that you are no good and have no value, [you] then also criticise [your]self.⁸²⁷

9.7 Lack of credibility compounds the disempowerment. Many women considered that they were not believed by lawyers,⁸²⁸ Family Court counsellors⁸²⁹ and judges,⁸³⁰ particularly in custody and access proceedings. When a woman raises allegations of violence she may be accused of doing so not out of true fear for her safety or that of her children, but only to hurt the father by frustrating his access to the children.⁸³¹ It may also be suggested that if the violence had been as severe as the woman alleged she could simply have left the relationship.⁸³² This implies that she is not telling the truth about the violence. These attitudes ignore the nature and effects of abuse on the woman and further disempower her.

Once I realised I wasn't going to be listened to with the violence, abuse, that I couldn't explain why I hadn't told of every act of violence against myself and child to my lawyer, I did not want to talk at all. Why? It wasn't protecting my child. It was totally pointless. I couldn't attend hearings, I couldn't afford to and I knew I had to stay away from my ex-partner for my mental stability . . . It took enormous strength to survive such an existence. Society makes it hard to recover by its ill-informed attitudes which pervade even into the legal system.⁸³³

[I]t often seems, and I certainly feel, that a woman's experience as a victim and survivor of domestic violence is often trivialised in Courts - both Family and elsewhere. This may be particularly so if the woman does not present as the 'classic victim' - ie, she is determined to regain control of her life, she attempts good grooming, she is clearly articulate and intelligent. None of this means that she is not frightened by her partner and has not been subject to violence, intimidation, threats and harassment at his hands. It will continue to be trivialised as long as the judiciary and court officials - even counsel - are uninformed about domestic violence.⁸³⁴

Violence and the Family Law Act 1975 (Cth)

'No fault' philosophy

9.8 Grounds for divorce. A major aim of the *Family Law Act 1975* (Cth) (the Family Law Act) was to remove fault as the basis of divorce. The various grounds for divorce, including adultery, desertion and cruelty,⁸³⁵ were replaced with a single 'morally neutral'⁸³⁶ ground of irretrievable breakdown of marriage, evidenced by one year's separation.⁸³⁷ The decision to eliminate fault from the ground of divorce did not necessarily require the total removal of considerations of the conduct of the partner from ancillary matters - custody, maintenance and property. However, the 'no fault' philosophy has permeated the Family Court's broader decision-making under the Act. The Court soon determined that since the conduct was not expressly mentioned in the new Act, it should be discounted unless it related directly to other provisions of the Act. This applied not only to old issues of matrimonial fault such as adultery, cruelty or desertion but to other forms of behaviour.

9.9 Application of the principle. In custody and access matters, past parental conduct is considered irrelevant unless it reflects on parenting abilities and therefore on the welfare of the child.⁸³⁸ Similarly it was decided that in maintenance except for 'rare and exceptional circumstances'⁸³⁹ misconduct could not be raised. In property proceedings conduct could only be considered in financial matters if it related directly to the parties' financial contributions to the marriage or to the creation of future needs.⁸⁴⁰ Some criticism of this approach led to proposed amendments by the Joint Select Committee in 1980.⁸⁴¹ These were not taken up.

9.10 Consequences. The very narrow scope for consideration of conduct under the Family Law Act has meant that matters of potential importance such as a history of violence have never been properly tested in the Family Court. The irrelevance of conduct has been reinforced by the conciliation model provided for in the Act and operated by the Counselling Service of the Family Court.⁸⁴² While the counselling function and the decision-making function exercised by judges and registrars are theoretically distinct, there have been

overlapping influences. The focus on non-judicial dispute resolution has meant that no action is taken in regard to serious and potentially criminal matters such as a man's violence against his wife.

9.11 **A recent critique.** A recent article on matrimonial property argues that 'the courts have retreated behind no fault discourse to strike out any allegations of . . . violence'.⁸⁴³ Even when it is considered by the Family Court, it is only the consequences of violence that are relevant, not the violence itself. The article argues that violence is relevant, and also that there are 'strong normative arguments for allowing the fact of violence against women in the home to benefit women in financial adjustment proceedings'.⁸⁴⁴ The article anticipates the response that treating violence as relevant reintroduces fault to the Act. It argues that violence is a form of conduct quite distinct from 'fault' as that concept is understood in the context of marriage breakdown. It is directly relevant to existing statutory factors in property cases.⁸⁴⁵

9.12 **Commission's view.** It is clear that twenty years after the introduction of the Family Law Act when the elimination of matrimonial fault from divorce is no longer controversial in the community, a more reasoned approach to issues of conduct in other parts of the Family Law Act should be possible. The Commission does not suggest that fault be reintroduced into divorce proceedings. Its concern is to ensure that where it is relevant in ancillary proceedings, violence is not overlooked. The court should consider the relevance and indeed significance of violence in determining the welfare of children and issues concerning contributions to property and financial need of the parties. It has been observed that violence needs to be made visible in the Family Law Act.⁸⁴⁶ The Commission has considered a number of options which would give violence a greater prominence in matters where it is clearly relevant. In the following section of this chapter, the main areas of law under the Family Law Act are examined.

Custody and access

Orders affecting children

9.13 **Types of orders.** When parents separate the Family Court may be asked to make orders for custody of the children, that is, who should have day to day care and control,⁸⁴⁷ and access, that is, whether a non-custodial parent should have access to the children and, if so, on what terms. The court may also be asked to determine whether one party should be awarded sole guardianship. In the absence of an order to the contrary, each parent of a child under 18 is a guardian. A guardian has responsibility for the long-term welfare of the child and has all the powers and duties in relation to the child other than day-to-day care.⁸⁴⁸

9.14 **Welfare of the child.** The Act requires that in all proceedings concerning children the welfare of the child is the paramount consideration.⁸⁴⁹ In determining this, the court is required to take a number of factors into account, including 'the need to protect the child from abuse, ill treatment, or exposure or subjection to behaviour which psychologically harms the child'.⁸⁵⁰

9.15 **Violence against a spouse.** A parent's violence against the child is clearly to be taken into account by the court in custody and access decisions. However, violence by one parent against the other has, in a number of reported cases, been distinguished as a separate matter which should not affect the court's decision.⁸⁵¹ In *Chandler*⁸⁵² the trial judge stated

A number of matters were placed before me which, it was alleged, were relevant to the issue of custody. One was the allegation that the husband was a violent man. Whatever may or may not have been the relationship between the parties themselves . . . I am only concerned with the affairs and conduct of the parents insofar as these directly affect the welfare of the children. There was no evidence of violence directly affecting the children, even if the wife's allegations were accepted as true.⁸⁵³

An order for joint custody was made in this case. This meant⁸⁵⁴ that although the children would be living with the mother, all major decisions about their welfare would be required to be decided by her in conjunction with the father. The decision was reached without any inquiry as to whether domestic violence may have caused or could in future cause harm to the children. It also ignored the possible effect of a history of violence on the chances of successful co-operation between the mother and father.⁸⁵⁵ The Commission also received evidence of more recent decisions. In a 1993 case a husband had committed many breaches of an access order and his wife had made serious allegations of violence and sexual assault. The judge stated

*. . . I (do) not intend to make findings relating to the wife's allegations of violence and sexual abuse, except in so far as it related to the parties' capacity as parents and to credit. To embark upon such an investigation would have been lengthy and in my opinion irrelevant to the issues before me relating to custody.*⁸⁵⁶

Another submission commented that men who are violent frequently obtain custody of the children 'seemingly without question by the court'.⁸⁵⁷

Effects on the children of violence against a parent

9.16 Problems. A substantial body of research indicates that children are significantly affected by a history of violence by one parent against the other.⁸⁵⁸ They are at significant risk of developing emotional and behavioural problems such as low self esteem, depression and anxiety, passivity, self-destructive and aggressive behaviour and poor school performance.⁸⁵⁹ Very young children are likely to exhibit psychosomatic disorders, such as stomach-aches, diarrhoea, asthma, nightmares and regressive behaviour.⁸⁶⁰ These effects can arise through the child witnessing the parent being physically or psychologically abused, becoming directly involved in the violent situation (for example, trying to warn or protect the mother) or suffering more indirectly as a result of the mother's frustration or fears.⁸⁶¹

9.17 Learned behaviour. There is a strong link between children's exposure to violence in the family and violence in their own relationships later in life, that is, a perpetuation of the culture of violence in the next generation.⁸⁶² Children learn destructive patterns of communication and conflict resolution, tend to identify along gender lines with parental positions and may assimilate attitudes which condone violence against women. The National Committee on Violence concluded that 'experiences of childhood and the influence of the family are paramount in determining whether or not an individual becomes violent in his or her behaviour'.⁸⁶³ It also stated that 'what is learned in the process of socialisation within the family can be both protection and a source of strength in coming to terms with or even altering' the realities of economic and gender inequality.⁸⁶⁴ Many of the Committee's recommendations concerned assistance to families where it believed 'the greatest difference can be made, by engendering non-violent values in children and by helping to ensure that they are brought up in an atmosphere free from violence'.⁸⁶⁵ Recommendations included parenting education and effectiveness training programs.⁸⁶⁶

9.18 After separation. When access is granted to a violent parent after the parties separate, abuse of the other parent may continue, either through physical violence or continuing patterns of dominance and fear set up during the marriage. This can increase the damage to the children.

One mother of two young children related her story during a phone-in to the Illawarra Legal Centre in New South Wales. She had obtained an apprehended violence order against her husband in 1989 and finally left him after being hospitalised as a result of his violence. She kept her new home address secret because of her fears of him. He later commenced access proceedings. When the case came before the Family Court in early 1992, he was granted unsupervised access to the children on an overnight basis each fortnight.

[She] was devastated by the decision. She also reports that her children were afraid to go, but she told them that "mummy would get in big trouble if they didn't go. They went for me." To protect her home address, [she] drove the 50 kms each way each fortnight to meet her husband at McDonalds, the drop off point. Each time, she reports that her husband would "abuse me, call me names. The children would always end up upset and frightened. I tried not to answer him back, as I was scared to provoke him."

*One Saturday she was in bed sick and could not take the children to meet him. Then about midday he turned up. "I was shocked that he knew where I lived . . . He started to abuse me about the children, and forced his way into the house to get them. They were crying when he took them away."*⁸⁶⁷

The trauma [faced by] my granddaughter aged 8 years in July has been unbelievably cruel and most distressing. There seems to be no compassion or consideration given to young children or their

*mothers where access has been enforced . . . The child is afraid of going with a man who has always been abusive [to her mother] . . . My granddaughter is an asthmatic and also has a number of other allergies. This was proved in court by three doctors who also stated that the stress of being forced to go on access or fear of being taken from her mother could and has apparently caused flare up of asthma attacks.*⁸⁶⁸

A domestic violence counsellor commented

*. . . In instances where there has been domestic violence, these children are in fear of their father, are damaged and traumatised by violence. Children and their mothers would like there to be . . . positive relationships, but in most cases, that is an ideal, and not the reality . . . children don't want to go but have to, he will go to court and demand it. Is this in the best interests of the child?*⁸⁶⁹

9.19 *Effects on parent/child relationships.* Both before and after separation, the abuse of the mother by the children's father can prevent her from developing effective parenting skills.⁸⁷⁰ Some children may suffer emotional neglect because of their mothers' stress through coping with the violent behaviour.⁸⁷¹ Older children may identify with the aggressor and lose respect for the victim, becoming more domineering towards her.⁸⁷²

9.20 *Recognition in other jurisdictions.* The effect on children of violence against their mother by her partner has been recognised by Canadian courts. In 1989 the Ontario Supreme Court refused custody to a father who had abused his wife, referring to clinical literature and stating that the physical and emotional abuse of the mother rendered the father unsuitable as a full-time parent.⁸⁷³ The Law Society of British Columbia recommended that a court take account of a parent's physical or mental abuse in deciding a child's best interests in custody and access decisions.⁸⁷⁴ It considered that violence constituted an important basis for denying custody or unsupervised access. There does not appear to be an equivalent decision in Australia and little to suggest that same approach is adopted here.

Custody

9.21 *Existing arrangements.* In determining which parent should have custody of the children, one of the factors which the court will consider is the child's interest in having the existing arrangements for his or her care continue.⁸⁷⁵ While the Family Court has repeatedly stressed that no special significance can be attached to this factor over any other relevant factor,⁸⁷⁶ it may be decisive where those other factors are evenly balanced. This has implications for a woman who flees a violent situation, leaving the children behind. The history of violence which caused her to flee may not be given any weight. Indeed, an adverse implication may be drawn about her fitness as a mother.⁸⁷⁷

9.22 *Fleeing to Australia.* A woman who fled from a violent partner in a Middle Eastern country, leaving the children behind with their father, gave evidence to the Commission that she believed she suffered further disadvantage in subsequent custody and access proceedings in Australia in 1993. The court gave little consideration to the circumstances in which the current arrangements for the children came to be established. They included the extent of violence she had endured and her lack of other options such as refuges or support from her family. She commented on the lack of any reference in the judgement to the history of violence.

*It is my contention that the Family Court . . . adopts an ostrich-like attitude of the paramountcy of the interests of the child as the situation exists at the time of the court hearing and completely ignores how the situation has evolved . . . It seems that the message of my case is that a woman must not leave a dreadful and revolting relationship unless she can get the children out with her. If she leaves without the children then she will effectively lose them, as status quo will be established by fair means or foul, and the status quo will then prevail.*⁸⁷⁸

Access

9.23 *The Court's attitude.* The Family Court has affirmed that access is not a parental right which the parent should only be denied for compelling reasons. Rather it should be determined in each case according to the

welfare of the child.⁸⁷⁹ The desirability of continued contact with both parents is a factor to be taken into account, but is not to be treated as a governing principle. However, submissions indicated that the court appears to maintain access on this basis even in cases where a high level of continuing conflict between the parties may suggest that access is detrimental to the child.⁸⁸⁰

9.24 Attitudes of lawyers. Submissions said that in some cases the Court is not made aware of the history of violence or that the woman opposes access because of violence. Lawyers appear to be reluctant to ask the Court to deny access as they believe such an argument would not succeed.⁸⁸¹ Delegates at a recent conference noted a lack of reported Family Court judgments which deal with violence against women. Reported cases are an important reference for legal practitioners and an increased reporting of judgments which deal with violence would help solicitors to develop a better understanding of the Court's attitude towards it.⁸⁸²

In December 1993 a woman tried to find a solicitor who would agree to defend a case in the Family Court. Her husband was applying for access to their two small children. Her husband had recently made death threats against her and the children and she had a protection order against him. She engaged a total of three solicitors and tried seven more before she found a lawyer who would take her case. She succeeded in having access denied in the Family Court.

On many occasions I was virtually being intimidated into allowing access which made me feel guilty and ashamed to stay with my initial decision or to say that I want to deny access.

Solicitors told me I had the right to ask for denial but whenever it became an issue (even before a hearing) I was told it would be impossible, that I should show the judge that I'm doing everything to enable the father access. I was constantly being trapped into agreeing with solicitors. Solicitors informed me that if I did not agree to some form of access the judge would decide and I might not be happy with this decision. . .

. . . Solicitors informed me that if he has sexually abused a child or if he is a mass murderer, then he might be denied access. Death threats meant nothing to solicitors. But for the woman in fear of her life and that of the children, she had to keep going until blood was shed.⁸⁸³

9.25 Access used to harass. The Commission was told that some men use access as a means of continuing harassment of and control over their ex-partners.

He was already on an AV [apprehended violence order] for trying to choke me when I was trying to leave him the first time. Then he gained access to our daughter through the Family Court. Every time he had access, he used it to hassle me. I never knew what he was going to do. On the day that he stabbed me, he came to the house. The court implied that I encouraged him to come into the house to have access, but it wasn't true. I couldn't stop him from coming into the house. He forced his way in. He stabbed me 14 times in the back, chest and arms. My daughter managed to get out of the house to get help . . .⁸⁸⁴

Improving the law's response

9.26 Relevance of violence. Violence against women may be a relevant consideration in custody and access decisions in considering:

- the effect on children of witnessing violence
- the parental capacity of the perpetrator
- the likelihood that access will be abused as a means of continued harassment of the other party
- appropriate arrangements for handing the children over at the beginning and end of visits.

Courts can take violence into account under existing law. For example, the effects of children witnessing violence and being otherwise affected by it can be considered under a current provision of the Family Law Act. Section 64(1)(bb)(va) requires the court to consider 'the need to protect the child from abuse, ill treatment, or exposure or subjection to behaviour which psychologically harms the child'. However, in view of the evidence that courts are reluctant to give weight to violence and that lawyers are reluctant to raise it, the Commission considers that an express reference in the Family Law Act to the relevance of violence in custody and access matters is needed.

9.27 *US experience.* In the United States legislation in a number of jurisdictions specifically acknowledges the relevance of parental violence to custody. It may require courts to consider domestic violence before joint custody is awarded; to add domestic violence as a factor to be taken into account in determining the best interests of the child; or to direct that domestic violence be taken into account in other decisions, such as in considering whether the best interest of the child requires supervised access where a protection order has been issued.⁸⁸⁵

9.28 *Amending the Family Law Act.* The most appropriate course would be to amend section 64(1)(bb)(va) of the Family Law Act so as to include an express reference to violence. This provision was considered recently by the Family Law Council in its advice on the operation of the *Children Act 1989 (UK)*.⁸⁸⁶ The Family Law Council has proposed amendments to the Family Law Act to change the legislative terminology from 'custody' and 'access' orders to 'parenting orders' which would better reflect continuing parental responsibilities to the child rather than parental rights. Parenting orders would refer to the child's 'residence' and 'continuing contact' with the parents. The report proposes retention of the 'best interests of the child' principle currently contained in section 64(1) but with a revised checklist of factors to be taken into account. The recommended replacement for section 64(1)(bb)(va) refers to 'any harm which the child has suffered or is likely to suffer'. While the Commission's discussion and recommendations are based on existing provisions of the Family Law Act, the same principles are equally applicable to the new draft provisions. Whether or not the Family Law Council's recommendations are implemented, the Commission considers that the section should include an explicit reference to the need to take account of exposure to violent behaviour towards a person other than the child.

Recommendation 9.1

Family Law Act s 64(1)(bb)(va) should be amended to provide that in considering custody and access orders the court must take into account the need to protect the child from abuse, ill treatment or exposure or subjection to violence or other behaviour, in relation to the child or another person, which physically or psychologically harms the child.

9.29 *Suspension of access.* An amendment to s 64(1)(bb)(va) would ensure that violence by a parent could be considered in custody or access matters where it was generally relevant to the welfare of the child. However there may also be a need for a more specific provision to deal with the particular problem of conflict and violence at the time of access handover. Such a provision would enable the Court to refuse or suspend access where the level of conflict is detrimental to the child's welfare. For example, a protection order may be in force and the mother may oppose access because she has reasonable fears for her safety or that of her children. Denying or suspending access in these circumstances would make clear to the aggressor that his conduct is unacceptable. It would place the onus on him to establish that access should be reinstated. It would also reinforce the principle that access may be suspended where its effect is to undermine the relationship between the child and the custodial parent.⁸⁸⁷ This is not to suggest, however, that access should always be denied where there has been a history of violence or fear of future violence. In some cases the mother may wish her children to have continued contact with their father, provided there are sufficient safeguards for her personal protection. As always, the best interests of the child, properly understood, should be paramount.

9.30 *A 'cooling off' period.* Where the potential for violence exists and no suitable arrangements for handover have been put forward and approved by both parents, access should be suspended for a period to allow the parties to consider their options and to make acceptable arrangements for handover. The responsibility should lie with the perpetrator to propose an acceptable arrangement. This may include handover at an independent handover centre.⁸⁸⁸

Recommendations 9.2

Family Law Act 1975 (Cth) s 64(1) should be amended to provide that, notwithstanding anything in that section, in making, varying or revoking an order of access by a party to a child, the court must consider whether that party has used or there is a risk that the party will use access as an occasion to expose the child, the other party or any other person to violence, threats, harassment or intimidation.

If the court determines that there has been violence or there is a risk of violence by the non-custodial parent during access visits or on handover, the court must suspend or revoke any existing access order, unless it contains arrangements which the court considers

(i) are in the best interests of the child,

(ii) are not unduly burdensome on the custodial parent and

(iii) minimise the risk of violence.

Before making a further order for access or reinstating an order for access, the court must be satisfied that arrangements for handover and access visits of the child are in the child's best interests, not unduly burdensome on the custodial parent and minimise the risk of violence.

9.31 *Access and protection orders.* All States and Territories now have some form of protection orders for those who are in fear of violence.⁸⁸⁹ Submissions drew the Commission's attention to the problem of conflict between orders of the Family Court of Australia and those of State or Territory courts.⁸⁹⁰ For example, a State court may grant a protection order which prevents the perpetrator from coming within a certain distance of the home. This may conflict with a Family Court access order which permits the non-custodial parent to visit the children at home or to collect them from home. In such cases the terms of the access order will override those of the State protection order.⁸⁹¹ Some police have expressed concern about administering protection orders where access orders may override them.

*We often get cases where there has been serious abuse against the woman and there are a whole set of stringent conditions on the AV [apprehended violence order]. Then at the end of these conditions it will say, "except in the case of access ordered by the Family Court", which just opens it up for the man to approach the woman again. There are not sufficient safeguards in the system.*⁸⁹²

9.32 The Family Court may not be aware of the existence of a protection order under State or Territory law and may make an order for access whose terms are in conflict with it. Protection orders made under State or Territory laws should be automatically accessible to the Family Court, either by registration with the Family Court or by on-line computer access, whether or not proceedings between the parties are currently before it. In making an access order the Court should also be required to have regard to the conditions of a State or Territory protection order. The matter of conflicting orders is being considered by the Standing Committee of Attorneys-General. The Commission considers that the Family Court has a responsibility to ensure that its own orders do not detract from the protection of the woman given by State and Territory courts. Similarly, State and Territory courts should also ensure that their orders are not rendered ineffectual by a failure to take account of orders made under the Family Law Act.

Recommendation 9.3

The Family Court or any court exercising Family Court jurisdiction under the Family Law Act, when making orders for custody and access, must take into account the existence of protection orders made under State or Territory legislation so as to ensure that the protection of women and children is not compromised.

9.33 *Access handover arrangements.* In some situations, despite past violence or the risk of future violence towards her, the mother may wish her children to have continued contact with their father, as long as her

personal protection is guaranteed. An acceptable option may be to have access handover at a neutral place which provides for her protection. The Family Court has on occasion made access orders with handover to take place at a police station. This provides a measure of protection for the woman and may for that reason be preferred by some women to handover in a public place or at the premises of a third person. However, there are concerns about whether the environment of a police station is suitable for children.⁸⁹³ The Commission also heard evidence of people waiting outside police stations to harass the mother after the child had been left inside.⁸⁹⁴ One alternative to police stations is the establishment of independent centres for handover of children on access and perhaps for supervised access on the premises. There have been numerous calls for these centres.⁸⁹⁵ Currently there are very few,⁸⁹⁶ although several groups have been interested in setting them up.⁸⁹⁷ The development of associated support services for parents, including counselling, has also been recommended.⁸⁹⁸

9.34 *Developments in the USA.* In the United States there has been a rapid increase in services which provide for both handover facilities and supervised access.⁸⁹⁹ A Bill has been introduced into Congress to provide funding for authorised centres for supervised visitation (access) for children who have suffered or are at risk of abuse, transfer of children to non-custodial parents, research into the effects of supervised visitation and education and support groups for both parents and children.⁹⁰⁰ The Bill specifically recognises that violence often continues and even escalates with separation and divorce and that parents and children may require protection.

9.35 *Financial considerations.* The development of access handover centres has significant financial implications.⁹⁰¹ In areas where few people may need these services, particularly in rural areas, an alternative to an independent fully staffed centre needs to be considered. The use of existing facilities, such as child care facilities (including those of the court), marriage counselling agencies funded under the Family Law Act and the implications for security need to be considered closely. These services may be the best available option but they should not be used for access handover if this would expose the users of the centre and its staff to a significant risk of violence or abuse.

9.36 *Concerns and limitations.* The proposal to establish centres for access handover would only be a partial solution to protecting women from harassment and violence. Suspension or refusal of access may be more appropriate in cases where the risk of harm is too great to allow access under any circumstances. Handover centres are likely to be of value only in marginal cases where there are concerns about safety, where the mother wishes contact between the child and the father to continue, and where it is clear that the child is not going to be exposed to harm. The absence of this kind of facility or of suitable handover arrangements should lead in some cases to denial or suspension of access.⁹⁰²

9.37 *Public funding.* The question of public funding for access handover centres involves a number of controversial issues. The Commission is unable to make a final recommendation that funding should be provided, but considers the issue is important and should be taken up for further consideration, including extensive community consultation, by the National Women's Justice Program.

9.38 *Separate representation.* In proceedings under the Family Law Act where the child's welfare is in issue, a separate representative may be appointed⁹⁰³ to act as an advocate for the child's interests.⁹⁰⁴ However, there are no guidelines in the Act to direct when appointment is appropriate. As a consequence wide variations in the frequency and circumstances of appointment of separate representatives have occurred.⁹⁰⁵ In the past the Family Court has questioned the need for legislative guidelines,⁹⁰⁶ but it has recently commented that they may be desirable.⁹⁰⁷ In the absence of any legislative guidance the Full Court has set out its own guidelines for appointment.⁹⁰⁸ They include cases involving allegations of child abuse 'whether physical, sexual or psychological' and cases where there is 'an apparently intractable conflict between the parents'.⁹⁰⁹ They also list cases 'where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare'.⁹¹⁰ This would include cases of 'serious family violence', including 'a history of serious threats or psychological and emotional abuse' of a parent. The Commission considers that, where there is an allegation of violence, the appointment of a separate representative would help to draw attention to the potential harm to a child from witnessing violence against a parent. It would ensure a proper focus on the welfare of the child, as distinct from the interests of the parents. In principle, the Commission favours making the problem of

violence more visible in family law decision-making and therefore views favourably the suggestion that if the guidelines are given statutory force violence should be included.

Recommendation 9.4

The Family Law Act should be amended to list the factors to be considered by the court in deciding whether to order separate representation. One of those factors should be in terms similar to section 64(1)(bb)(va), that is, whether the child has been or there is a risk that the child will be abused, ill-treated or exposed or subjected to violence or other behaviour which is psychologically harmful to the child.

International child abduction

9.39 ***The Hague Convention.*** Where a child is abducted, that is, taken from another country to Australia (or the reverse) in breach of a custody order there are two possible legal regimes, depending on whether the other country is, like Australia, a party to the Hague Convention on the Civil Aspects of International Child Abduction.⁹¹¹ The Convention seeks to ensure that any child abducted from one Convention country to another Convention country is promptly returned to the child's country of residence unless exceptional circumstances apply. The circumstances are listed in the Family Law (Child Abduction Convention) Regulations. These include, where there is a 'grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'⁹¹² or where the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.⁹¹³ The Full Court of the Family Court has also interpreted the Regulations as giving the court a residual discretion whether or not to make an order.⁹¹⁴ The Convention envisages that full hearing on custody or access should take place in the country of the child's residence once the child is returned. A Contracting Authority is set up in each country to facilitate the process.

9.40 ***Non-convention country.*** If the other country is not a party to the Hague Convention, in theory the principle of the paramount welfare of the child prevails.⁹¹⁵ The court of the country to which the child has been abducted has two options.⁹¹⁶ It can hear and decide a custody case or it can order the child's return and leave any substantive custody action to be determined there. However, Australian courts are now tending to apply the same principles to this situation involving a non-Convention country as apply under the Convention.⁹¹⁷ That is, rather than investigating fully whether the child should be returned they are tending to return the child. The Convention is seen as helping to deter abductors and to prevent an abducting parent from benefiting from the wrongful act by allowing that spouse in effect to choose the forum for any court case.

9.41 ***Effect of the Hague Convention.*** The Convention rule which requires repatriation of abducted children may have a different effect on men and women. Both fathers and mothers abduct their children but it would appear that they do so for different reasons. In half the reported cases over the last five years involving abducting wives there was evidence of a history of violence.⁹¹⁸ However, in none of the cases of abducting husbands was violence mentioned although in most of them the husband had previously been refused custody. While it is possible that violence is less frequently a reason for abducting children in unreported cases, the Commission was told that it is nonetheless a significant problem.⁹¹⁹

9.42 ***Interpretation of the Regulations.*** Although the wording of the Regulations would permit an argument about the effects of violence on children the Australian courts have so strictly interpreted these Regulations that violence has not been treated as relevant.⁹²⁰ The courts take the view that it is for the country of residence to protect the wife and child from the husband's violence, even where apparently the wife may have to stay in hiding in that country. This is despite the express reference in the Regulations to the child being subjected to a 'grave risk of physical or psychological harm' or an 'intolerable situation'.

9.43 ***Case example.*** A woman fled with her child to her previous home in England. An English court ordered that the child be returned to Australia under the Convention but accepting her evidence which was put before the court about her husband's violence it imposed conditions on him in Australia to protect her safety. Under the Convention there is no power to make such conditions nor for them to be enforced in Australia. As a

result of the order the wife was required to return to Australia with the children to seek custody so that she could take the children back to England. She had no financial assistance and did not receive legal aid and her husband did not keep the conditions imposed by the English court. The Family Court sitting in its welfare jurisdiction noted that

There is however no mechanism within the Convention that enables the Contracting State which is ordering the return of the children, to ensure that the State to where the children are returned actually provides the mechanism to enable a proper hearing to take place. This is not necessarily limited to the provision of a forum for the hearing of the dispute. It may also require the provision of appropriate legal representation.⁹²¹

9.44 Case example. A mother brought her three young children to Australia, claiming that she had left New Zealand to remove herself and the children from a situation of violence. In proceedings under the Hague Convention in the Family Court of Australia the trial judge found that the removal of the children from New Zealand was wrongful. The wife appealed. One ground was that the trial judge erred in not finding 'a grave risk of physical or psychological harm' to the children or 'an intolerable situation' for them if they were returned to New Zealand. The mother's evidence about her husband's violence against her included photographs of her injuries which the court found indicative of considerable physical damage and bruising to her, consistent with the sort of violent attack which she described. Her mother and other witnesses had given evidence of his violence against her. There was also evidence given of her husband's involvement with a gang known as the Mongrel Mob which she claimed would probably be enlisted by her husband to be violent towards her, and allegations of various threats by her husband against her, including death threats.⁹²² She said that the children had been detrimentally affected by the husband's behaviour in the past and that if she returned to New Zealand she would have to stay in a refuge as she could not safely stay with any relatives or friends. The Court stated

It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand Courts or that relevant New Zealand authorities would not enforce protection orders which are made by the Courts. In our view and in accordance with the views expressed by this Court in Gsponer's case, the circumstances in which Regulation 16(3) comes into operation should be largely confined to situations where such protections are not available. Similar views have been expressed by the court of other countries . . . For us to do otherwise, would be to act on untested evidence to thwart the principal purposes of the Hague Convention, which are to discourage child abduction and, where such abduction has occurred, to return such children to their country of habitual residence so that the courts of that country can determine where or with whom their best interests lie.⁹²³

9.45 Misuse of the Convention. Another problem that arises with the Hague Convention is the potential for it to be misused by men as a means of exercising continuing power over their partners. A man may commence custody proceedings in Australia to bring the woman and children back from overseas and then may discontinue proceedings. The woman is then in an invidious position, usually in a refuge, without income, and unable to leave. It was suggested that in such cases the Contracting Authority Representatives should accept responsibility to continue proceedings.

9.46 Commission's view. The principal purpose of the Convention is to deter child abductors by preventing any advantage flowing from the removal of a child to another country. This approach works well in the majority of cases where the abductor is in fact seeking to thwart the other party by taking the law into his or her hands and thereby gain an advantage. But it can have unjust consequences on a person who has a just cause for leaving if it penalises those women who have been subjected to violence and who flee with their children for their own safety. It is not in the child's best interests to enforce the return of the child and mother to the country of habitual residence to determine custody when this would expose the child's mother and perhaps the child to serious danger. Violence against the mother has significant effects on the child.⁹²⁴ This should be directly reflected in the Regulations so that the child's return should not be ordered if to do so is likely to endanger the safety of the parent in whose care the child is. Furthermore, to expose the mother to the trauma, difficulty and cost of returning to pursue custody litigation is not consistent with the purpose of the Convention when she is a survivor of her husband's violence and took a reasonable course of action to protect herself. The Hague Convention gives a court a discretion whether to return the child in these circumstances.⁹²⁵ Given the strict interpretation the court has taken of the Regulations, they should be amended. The issue could also be raised by the Commonwealth as part of its reporting functions under the Convention.

Recommendations 9.5

Regulation 16 of the Family Law (Child Abduction Convention) Regulations should be amended to provide that in deciding whether there is a grave risk that the child's return would expose the child to physical or psychological harm or an intolerable situation regard may be had to the harmful effects on the child of past violence or of violence likely to occur in the future towards the abductor by the other parent if the child is returned.

The Commonwealth Contracting Authority should be requested to raise the problem of women fleeing with their children from violent spouses with the monitoring body of the Convention with a view to amending the Convention to make it clear that in deciding whether a child should be returned under subregulation (3) the Court must take into account the likelihood that the child will be exposed to violence or the effects of violence by one parent against the other.

The Regulations should provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has the care of the child.

Funds should be provided by the Commonwealth to the Commonwealth Contracting Authority to ensure that in appropriate cases either parent can take action for custody to be determined in the Family Court.

Property and maintenance

Current law

9.47 ***The Court's powers.*** The Family Court has the power to make orders for spousal maintenance⁹²⁶ and for division of property.⁹²⁷ Property division is based on considerations of past contributions to the relationship (both financial and non-financial, including contributions to the welfare of the family) and on future needs and disparities in the parties' financial positions (including matters listed in section 75(2)).

9.48 ***Financial consequences of violence.*** In determining maintenance and property division, the general approach adopted by the Family Court is that violence is irrelevant, except where it has direct financial consequences.⁹²⁸ Yet in the consideration of each party's past contributions to the marriage and future needs, violence clearly has much wider ramifications than are currently acknowledged.⁹²⁹ Violence against a woman by her spouse is directly relevant to her ability to contribute to the marriage and to her future needs, including her health and her earning capacity. As with matters relating to the welfare of the child, the problem is not that the relevant provisions of the Act preclude the court's consideration of violence but that violence is overlooked as a relevant factor in many reported cases.

9.49 ***Contributions to the marriage.*** Violence should be taken into account in determining the extent to which it diminishes the ability of a woman to make financial and non-financial contributions to the marriage. It has also been suggested that violence constitutes a negative contribution to the welfare of the family.⁹³⁰ The Family Court has recognised negative contributions to the marriage where they are of a financial nature.⁹³¹ These are generally cases where one party's conduct has reduced the financial resources to a significant extent or reduced the other party's ability to achieve financial independence. The Court has however resisted recognising negative non-financial contributions on the grounds that this necessarily implies fault.⁹³² Yet a man's violence may have a significant impact on the welfare of the family.⁹³³

9.50 ***Needs of the parties.*** Violence could also be taken into account in relation to the future needs of the parties.⁹³⁴ Factors referred to in the Act include

- the state of health of a party⁹³⁵
- the financial resources and capacity for employment of each party⁹³⁶
- the extent to which the marriage has affected a party's earning capacity⁹³⁷

- any fact or circumstance which justice requires to be taken into account.⁹³⁸

A new framework for division of property

9.51 **Existing law.** In *Mallet's case*⁹³⁹ the High Court held that in the context of a marriage of reasonable duration there was no presumption of an equal division of property as a starting point as this would limit the court's discretion which according to the Act is unfettered. It held that the court must start from the facts of ownership of the property and then decide if it was 'just and equitable' to depart from this, taking into account past contributions and future needs under section 79 of the Act.

9.52 **The Commission's previous inquiry into property division.** In 1987 the Commission examined the division of matrimonial property.⁹⁴⁰ It concluded that a major weakness of the present provisions was their emphasis on assessing and comparing the parties' financial and non-financial contributions in each individual case with the resulting uncertainty that this entails. The Commission recommended that a principle of equal sharing of the value of all parties' property should apply as the starting point, subject to certain specified grounds for variation.⁹⁴¹ Those grounds include greater past economic contributions to the marriage, including a substantially greater contribution to the marriage by one party, the actions of the parties in relation to property or child care after separation, the fact that one party has the benefit of the financial resources built up during the marriage, and whether one party brought property into the marriage or acquired it during the marriage by way of gift, inheritance, compensation or damages.⁹⁴² They also include disparity between the standards of living of the parties after separation because of responsibility for future care of the children or the effect of the marriage on a party's income earning capacity.⁹⁴³

9.53 **Joint Select Committee Report 1992.** The report of the Joint Select Committee recommended that the Family Law Act should be amended to provide that equality of sharing is the starting point subject to variation for listed exceptional circumstances.⁹⁴⁴ The circumstances listed include many which do not appear to be extraordinary but rather are in the nature of routine discretionary factors. They are 'the length of the marriage; the care of children; obligations incurred under the child support legislation; the future needs of each spouse; the financial impact on each of the parties; the property brought into the marriage; the homemaking and child rearing contribution; and the financial contribution by each person.' There is no reference to the effect of violence on a party's contributions or future needs. The Government response to the report agreed with the starting point of equality of sharing but noted that it would consider whether a wider range of circumstances should be included in the grounds for departure from that principle.⁹⁴⁵

9.54 **The Commission's view.** The Commission endorses its general approach in its Matrimonial Property Report rather than the recommendations of the Joint Select Committee. However, in view of the evidence received in this inquiry the Commission now also recommends that there be a specific reference to the effects of violence as a circumstance which justifies departure from the principle of equal sharing.

Recommendation 9.6

The Commission endorses its previous recommendations in its report on Matrimonial Property which states that a rule of equal sharing should be the starting point in distribution of property. Any formulation of circumstances in which the Court should depart from equality as a starting point should include a reference to the impact of violence on past contributions and on future needs.⁹⁴⁶

9.55 **De facto relationships.** The Family Court deals with matters relating to children of a de facto relationship.⁹⁴⁷ However, it does not hear property matters where the parties have not been married, unless those proceedings are related to matters concerning children of the relationship.⁹⁴⁸ Where property disputes arising from a de facto relationship stand alone, a woman must make a claim in the relevant State or Territory court. This is a much more difficult and uncertain process than proceedings under the Family Law Act. Five jurisdictions do not have any legislation which deals with the property interests of parties to de facto relationships.⁹⁴⁹ In those which do, the rights given are limited. For example, they may only relate to real property (that is, houses or land)⁹⁵⁰ or may take into account only the parties' past contributions rather than their future needs.⁹⁵¹ Where there is no legislative provision, a claim must be established under the general law. Equitable principles apply but they are complex and uncertain in scope. As a result, litigation of

such claims is expensive and its outcome is much less certain than proceedings under the Family Law Act. This makes it more difficult for women who have been disempowered by past violence or threats of future violence to pursue a remedy.

The situation can be likened to that of a refugee - being forced to flee their home because of abuse, and taking absolutely no possessions with them. Our country recognises the hell which refugees have experienced and ignores the thousands of Australian women who are experiencing a similar situation . . . Because is it so ridiculously expensive to get legal redress for a property settlement worth approximately \$25 000, the law (my country!) is sending the abuser a clear message that it's OK to behave violently towards your spouse and that men are under no obligation to provide a property settlement if the "marriage" ends . . . [P]olice and the courts are being told to issue restraint orders against men - but they must also ensure that the woman is not robbed of her property and investment when she leaves that person because of the violence acknowledged by the restraint order.⁹⁵²

The Commission has previously recommended that the law relating to de facto relationships should be uniform throughout Australia.⁹⁵³ This was also recommended by the Joint Select Committee.⁹⁵⁴ The referral of power over de facto relationships from the States to the Commonwealth is currently being considered by the Standing Committee of Attorneys-General.⁹⁵⁵ This would enable a single uniform national law to be applied by the Family Court.

Recommendation 9.7

The Commission endorses its previous recommendation in its report on Multiculturalism and the law that the law relating to property disputes arising from de facto relationships should be uniform throughout Australia. This should be achieved through a referral of powers to the Commonwealth by the States.

The Commission further recommends that a uniform law should take account of the parties' future needs as well as past contributions.

9.56 **Damages for assault.** Under federal and complementary State and Territory cross-vesting legislation the Family Court may hear general claims for damages where one party has assaulted the other party or the children if it arises in relation to family law proceedings.⁹⁵⁶ It has done so recently in two cases while also dealing with property matters. In *Marsh v Marsh* a woman who had been assaulted by her husband was awarded \$2000 general damages, \$2000 as aggravated damages (awarded where the defendant's conduct is deliberate to compensate for any indignity suffered by the victim) and a further \$3000 as exemplary damages (awarded where the amount is inadequate to punish the defendant or to deter him or others from acting similarly).⁹⁵⁷ In a recent decision two daughters' claims (through their next friend) against their step-father for damages for sexual assault were heard in conjunction with the property proceedings before the Family Court.⁹⁵⁸ This is an interesting development which may provide a more accurate picture in the Family Court of the financial consequences of violence. However, the Family Court will only be dealing with such cases as a result of cross-vesting. An alternative approach would be to create a cause of action directly under the Family Law Act for torts which arise out of family relationships. The development should be monitored.

Alternative dispute resolution processes

Alternative dispute resolution in the Family Court

9.57 **The 'Helping Court'.** Since its inception the Family Court has placed a strong emphasis on the settlement of disputes out of court. The court was designed to include facilities for active pre-divorce and post-divorce counselling to assist reconciliation, to reduce distress and hostility and to assist family members with continuing problems after the breakdown of the marriage.⁹⁵⁹ In particular, these processes were envisaged as saving the children from being subjected to bitterly fought litigation.⁹⁶⁰ Various sections of the Family Law Act require the court and lawyers to consider the possibility of reconciliation and to advise the parties of counselling and conciliation procedures.⁹⁶¹ There has been a growth in dispute resolution processes in many areas of the law since the late 1970s.⁹⁶² This has been reflected in an increased emphasis on

conciliation procedures and the introduction of mediation in the Family Court.⁹⁶³ The Government has recently proposed to shift the entire focus of the Family Law Act from litigation to alternative dispute resolution.⁹⁶⁴ While this may have some advantages, particularly in terms of costs, it has serious implications for women who have been subjected to violence.

9.58 *Dangers in alternative dispute resolution.* The perceived advantages over litigation include lower costs, the potential to allow the parties to have some control over the process and its outcome, more flexibility in resolution of problems and an increased likelihood that the parties will abide by agreements reached by agreement between them.⁹⁶⁵ However, there are concerns that women are disadvantaged by the nature of alternative dispute resolution processes in family law because men are likely to be in a stronger position and to have greater bargaining power, for example, through their greater knowledge of family finances and their more assertive style of communication.⁹⁶⁶ Submissions to the Commission noted these problems.⁹⁶⁷ In particular, it has been questioned whether alternative dispute resolution should be used where there is violence within the family.⁹⁶⁸ The negotiating power of a woman who has been subjected to violence may be seriously diminished. Continued formal contact with the perpetrator exacerbates her disempowerment and anxiety. It has been suggested that the Family Court's philosophy of emphasising conciliation and mediation is inappropriate when relationships are characterised by violence.⁹⁶⁹ The Court has acknowledged the need to protect those who have been subjected to violence within the family. In 1993 the Chief Justice issued guidelines for the management of cases where there is violence.⁹⁷⁰

9.59 It is essential that more attention be paid to the consequences of violence and its relevance to the way parties negotiate. This is particularly important since the vast majority of matters are settled without the intervention of a judge after a conciliation conference.

9.60 *Three types of alternative dispute resolution.* Three different types of alternative dispute resolution operate in the Family Court and must be distinguished.⁹⁷¹

- Counselling is concerned with healing the feelings and with issues underlying the parties' disputes. Under the Family Law Act, either party may request confidential counselling on their relationship to each other or to the children.⁹⁷² However, marriage counselling organisations approved under Part II of the Act generally perform this function in each State and Territory.
- Conciliation implies persuasion of the parties to achieve resolution of disputes. The conciliator is responsible both to the clients and to the legal system. Conferences with a registrar or deputy registrar are generally required prior to a court hearing in property matters.⁹⁷³ These can become conciliation sessions. The Family Court Counselling Service may be involved in 'conciliation counselling' in custody and access matters.⁹⁷⁴
- Mediation is a voluntary process where a trained neutral third party assists the parties to reach a mutually acceptable settlement. A pilot mediation program was introduced to the Family Court in 1992 and is run completely separately from the Counselling Service.⁹⁷⁵

The Family Law Act also provides for resolution of disputes by arbitration, that is, the decision of an independent third party who is not a judge.⁹⁷⁶ However, those provisions have not yet been implemented.

Conciliation counselling

9.61 *Conciliation processes in the Counselling Service.* The term 'conciliation counselling' is used in the Family Law Act without definition.⁹⁷⁷ This makes it difficult to describe with precision the nature of the process. It is likely that practices vary among different registries and different counsellors.⁹⁷⁸ Conciliation counselling in the Family Court has similarities to counselling in that it deals with the underlying emotions of the parties as a first step in resolving conflict. Its objective, however, is to reach agreement between them, taking into account their needs and those of the children. Under Part VII of the Act which relates to children, the court may at any stage direct the parties to attend a conference with a court counsellor or welfare officer to discuss the child's welfare and to try to resolve any differences between the parties as to matters affecting the child's welfare.⁹⁷⁹ No proceedings relating to guardianship, custody or access of a child can proceed to trial unless the parties have attended counselling with a court counsellor or welfare officer, unless special

circumstances apply.⁹⁸⁰ A welfare officer or court counsellor may also be ordered by the court to prepare a report on the welfare of the child⁹⁸¹ and as part of this process may request interviews with the child's parents.

9.62 Criticism of the Counselling Service. The Commission received many submissions critical of conciliation counselling where violence has occurred; these concerned the principle and the practice.⁹⁸² Some women said that they were not believed by counsellors,⁹⁸³ that counsellors did not understand the effects of domestic violence,⁹⁸⁴ and that counsellors showed bias.⁹⁸⁵ It was considered that they often operated on personal judgement rather than specialised knowledge⁹⁸⁶ and that they lacked an appreciation of the dangers of leaving a violent relationships.⁹⁸⁷

For many domestic violence perpetrators, the Family Court offers a whole new arena for harassing their victims. . . Women who have struggled for years to escape the violence of their husbands are forced to endure what feels like endless confrontations with their violent husbands . . . Victims - both men and women - are often pressured by the Family Court counsellors into agreeing to face to face meetings despite the trauma this creates for the victims. In many domestic violence cases, the Family Court counsellors expect the man and the woman to be able to sit down together and discuss and negotiate issues, in complete disregard of the years of violence and intimidation that the woman may have suffered at the hands of the man.⁹⁸⁸

Another woman claimed that the Family Court counsellor had accused her of bias against her former husband.

Do other victims of attempted murder have to sit and speak (with their children) to the offender? How would you react, could you be totally normal taking into account years of total control and terror? We are then judged on our willingness to discuss what is 'best for the child'.⁹⁸⁹

Family Court guidelines provide the possibility of separate counselling where there is a fear of violence.⁹⁹⁰ Nevertheless, submissions referred to pressure from court counsellors to have joint counselling sessions despite being told of these fears. They also noted a lack of appropriate safeguards for safety in these circumstances.

[In January 1992] a court counselling session was to be held between my husband and myself. I had spoken to the counsellor prior to the session by phone about my fear of my violent husband and arranged for me to leave earlier for safety reasons. During the session I made it very clear the large amounts of violence the children and I had been subjected to over nineteen years of marriage. My husband's behaviour made it very clear as to the problems he has with his violence during this counselling session.

A few weeks later the counsellor phoned me trying to persuade me to meet with my violent husband "[name deleted] he'll go over the edge if you don't see him!" I was extremely distressed at this and explained again how terrified I was of his violence and did not wish to see him . . . I said I was not responsible for his behaviour and I agreed to speak to my counsellor and then let the court counsellor know in a few days.

At no time did I wish any contact with my husband and the thought that he could manipulate a court counsellor who was aware of his violence into acting for him to convince me to meet with him was devastating for me.

When I rang back to let her know my decision she continued to persuade me to meet with my husband and I said definitely not. The counsellor's voice was angry and she kept saying "Well if you don't care what happens to him there's nothing I can do about that!" . . .

[In July 1993] my husband opposed my application for divorce . . . the magistrate on the day of hearing accepted verbally that my husband opposed the divorce on the grounds of not having access.

A welfare report had already been done and was extremely clear as to what the children wanted and did not want. This was ignored and a counselling session was ordered by the court . . . When I arrived with a friend for safety reasons at the counselling rooms there was no-one else there except my violent husband. Once again there were no safety precautions taken. The court was aware of the violence my husband was capable of and yet this seemed to have been disregarded and again I was put in a potentially dangerous situation.⁹⁹¹

My former husband and I attended a court-ordered counselling session of almost four hours with a Family Court counsellor, who refused to allow my request for separate counselling, despite policy on matters involving domestic violence. I was required by the counsellor to account for almost every statement I made and my husband was not. I felt as though I was in a room with two adversaries. It was a most distressing experience. I felt disbelieved and that the counsellor had little understanding of the dynamics of domestic violence and his clinical skills reflected that. His report was subsequently fairly even-handed.⁹⁹²

9.63 Registrar's conferences. The Commission received criticism of the disempowerment of women in registrar's conferences where their husbands had been violent.⁹⁹³

My case is of domestic violence and child abuse . . . I requested for my solicitor to be present [at the Order 24 conference]. This was denied.

The access needs for the children were different, my daughter not wanting to stay overnight. The Registrar coerced, pressured me to agree to overnight [access] for my daughter in one month. I asked him if I agreed, what would happen if she didn't want to go? He wouldn't answer and changed the subject. I knew if I agreed my husband would pressure her into it, or just keep her. I eventually broke down, but did not submit to overnight [access] for my daughter.

In summing up I felt both the court counsellor and Registrar weren't concerned for the safety and emotional well-being of the children, but wanted access for my husband and for it to be neat and tidy.⁹⁹⁴

Clearly, if both parties are honest, and if there had not pre-existed the realities of violence and enforced poverty, this process would be acceptable as a decongestive for the courtrooms; and as a precluder to more expense for the contesting parties. Equally clearly, when there is an history of long-term violence AND enforced poverty there must become obvious the reality that there is NOTHING inherent in this process to preclude false [evidence] upon which inane and unjust compromises are based, for, indeed, there is no opportunity in the process for the presiding Registrar to access any background information at all. . . .

I explored, yet was NOT informed clearly and adequately of the nature of this process. Many are more timid. Tired. Sicker. Fearful. Many cannot just move out into the workforce again without rehabilitation. I am very lucky in these aspects - yet have found this process enormously frustrating, anger-making and really unjust. The process IS pushed upon people - particularly women. These women believe it will be a just and relatively simple business; although to believe any family law matters are simple would be unrealistic and myopic!⁹⁹⁵

9.64 Issues for counsellors and registrars. Counsellors and registrars have an obligation to seek to detect that there has been violence even where it has not been raised by the parties. Once violence has been detected, it must be dealt with by people who are properly trained in the dynamics of family violence. The Family Violence Policy and Guidelines list strategies for counsellors to identify violence, including suggested intake questions where counselling is voluntary, and provide for clients to be notified of the availability of separate interviews.⁹⁹⁶ They also 'aim to update and increase awareness and understanding of the role family violence plays'.⁹⁹⁷ However, there is clear evidence that more needs to be done. The National Committee on Violence Against Women called for specific guidelines and policies to assist counsellors to respond to violence. The Joint Select Committee also recommended that the Family Court Counselling

Service review its staffing levels and training program to ensure that all counsellors regularly update their knowledge and skills, particularly in regard to domestic violence and child sexual abuse.⁹⁹⁸

Recommendation 9.8

Court counsellors, Registrars and specialist family lawyers should receive training in the dynamics of family violence, in particular in the disempowering effect on the target of the violence and the effect on the ability to negotiate or reach agreement.

The Family Court should improve procedures to ensure that whether counselling is voluntary or court-ordered, where violence has been a factor in the relationship, counsellors are informed of it before the first appointment.

Where there is a history of violence, the allocation of counsellors should take this into account and the most experienced counsellors should be allocated to the case.

Because it appears that many women are being compelled to attend joint counselling where they are in fear of their partners, there should be a specific provision in the Act which acknowledges their right to be interviewed separately, or in some cases to be excused from the requirement to attend counselling. This requirement extends not only to s 62 and 64(1) which deal with the welfare of children, but also to the more general provisions of s 14 which require the court to consider the possibility of reconciliation between the parties and to make appropriate orders about counselling.

Recommendations 9.9

The Family Law Act should provide that where the court is considering making an order that the parties attend counselling under s 14(2), 14(2A), 14(4), 14(5), 62(1) and 64(1AA), it shall take into account any allegations of violence or reluctance of a party to attend because of violence, or the need to ensure the protection of a party.

S 64(1B) should be amended to provide that in considering whether it is appropriate to make an order concerning the custody, guardianship or welfare of, or access to, a child, without requiring the parties to attend a conference, the court shall consider the circumstances relating to violence alleged against a party or found to have occurred.

Mediation

9.65 ***The new mediation provisions.*** Following recommendations made in 1990 by the Mediation Subcommittee of the Working Party on the Review of the Family Court, a new Part IIIA was inserted into the Family Law Act.⁹⁹⁹ This allows for approved mediators to operate within the framework of the Family Court. Both parties must consent to participation in mediation. Limited pilot mediation projects have been established in Melbourne and Sydney.¹⁰⁰⁰ The Family Court has now received funding for the establishment of permanent mediation units in Sydney, Melbourne and Brisbane.¹⁰⁰¹

9.66 ***Guidelines about violence.*** Guidelines for mediation in cases where there is violence were issued by the National Committee on Violence Against Women.¹⁰⁰² The principle is that mediation should not proceed 'unless the woman has made an informed choice to be part of this process'. The Family Law Council considered mediation in family law proceedings to be inappropriate where, among other things, there is a serious inequality in capacity to negotiate, or a fear/threat of violence or abuse.¹⁰⁰³ The Family Court has recognised the special problems of power imbalance where violence or the potential for violence exists. Strict guidelines provide that mediation will normally be regarded as inappropriate in cases of violence, and also provide screening procedures aimed at ensuring that violence is detected. A co-mediation model is used, that is, one male and one female mediator from a mixture of legal, psychological and social work backgrounds run the sessions together. This is believed to have particular advantages, including providing a counterweight to bias; allowing the demands of the session to be shared and providing an opportunity for

training and supervision of mediators; allowing clients to communicate with the person they feel most comfortable with; and providing a model of co-operation between the sexes.¹⁰⁰⁴

9.67 *Concerns about mediation.* The Family Court mediation program appears to have been set up with careful consideration of possible power imbalances, particularly where there is a history or threat of violence. However, the Commission is concerned that the process continues to be monitored. What began as a voluntary process may eventually become mandatory, particularly where pressure on court resources increases. This should be avoided. There is also the danger that safeguards may slip as cost-cutting begins, for example, through the use of single mediators where two may be preferable. The use of single mediators is now being trialled in matters concerning children.¹⁰⁰⁵ The National Committee on Violence Against Women has issued guidelines for mediation, including the principle that 'only the best, most experienced mediators should accept cases involving violence'.¹⁰⁰⁶

Recommendation 9.10

Part IIIA of the Family Law Act should be amended to provide that mediation should not take place where violence has occurred or is occurring unless the woman has made an informed choice to be part of this process and enquiries have been made to establish whether violence has been a factor in the relationship which may affect the ability of the parties to negotiate successfully.

Personal protection from violence

Two sources of protective orders

9.68 There are two sources of orders for personal protection of a woman or her children from violence: injunctions under the Family Law Act and protection orders under State and Territory legislation.¹⁰⁰⁷ Protection orders are the only form of order for personal protection available to a party to a de facto relationship, other than in NSW.¹⁰⁰⁸

Family Law Act injunctions

9.69 ***Scope of injunctions.*** Two types of injunctions for personal protection are available under the Family Law Act: injunctions for the protection of a child or of a person who is entitled to custody, guardianship or access to the child,¹⁰⁰⁹ and injunctions for the personal protection of a party to a marriage.¹⁰¹⁰ The term 'personal protection' has been construed widely to include protection from behaviour other than physical violence, for example, behaviour which affects a woman's health and well-being.¹⁰¹¹ Injunctions may also be issued for the protection of a party's property and in relation to the use or occupancy of the matrimonial home.¹⁰¹²

9.70 ***Criticism.*** Family Law Act injunctions have in the past been strongly criticised for their ineffectiveness in ensuring personal protection from violence.¹⁰¹³ They are costly to obtain and, therefore, can be impractical, especially where there is an immediate threat. Penalties for breaches have been criticised as inappropriate, particularly when breaches were punishable only as a contempt of court. Significant legislative amendments have been made in recent years, including the provision of an automatic power of arrest for breach of an injunction in certain circumstances.¹⁰¹⁴ There are also new sanctions for non-compliance, including imprisonment, fines, recognisances and sequestration of property.¹⁰¹⁵ Criticism continues, however.¹⁰¹⁶ Submissions expressed concern particularly about the lack of enforcement of orders and injunctions by police, the imposition of inadequate penalties by the court where a breach has been established, and limitations on the scope of orders.¹⁰¹⁷

9.71 ***Harassing behaviour.*** Several States have enacted or are considering enactment of legislation which deals with harassing and intimidating behaviour.¹⁰¹⁸ Although the scope of Family Law Act injunctions for personal protection is wide enough to include harassing and intimidating behaviour, it is left to the court's interpretation. The Joint Select Committee recommended amendments to the Act to clarify the meaning of 'personal protection' to address the situation where no actual assaults or threats are made.¹⁰¹⁹ The

Commission recommends that any definition of the scope of an order for personal protection should refer explicitly to harassing and intimidating behaviour.

Recommendation 9.11

Sections 70C and 114 should be amended to define the scope of injunctions for personal protection from violence. The definition should include within the scope of injunctions orders for protection from harassment, intimidation, threats and stalking.

9.72 *Enforcement of injunctions.* There are continuing difficulties with the enforcement of injunctions.¹⁰²⁰ The police may arrest a person for breach of an injunction without warrant where the person against whom the injunction has been granted has breached it by causing or threatening to cause bodily harm to the person concerned.¹⁰²¹ However, the power of arrest without warrant does not extend to harassing or intimidating behaviour which falls short of threats of such harm. A person who is arrested must be brought before the court within 24 hours or released from custody.¹⁰²² This may allow the person to continue the harassment while waiting for the court to hear proceedings relating to the initial breach.¹⁰²³ Amendments have been proposed to the relevant provisions of the Act¹⁰²⁴ and the Commission endorses those initiatives. It also urges that efforts be continued to ensure that liaison between the Family Court and the federal and State police forces with respect to enforcement of orders and injunctions is improved.¹⁰²⁵

9.73 *Penalties.* In recent years the Family Court has made strong pronouncements on the seriousness of conduct which breaches a s 114 injunction and on the court's attitude towards these breaches.

The Full Court of the Family Court upheld a conviction of 2 years imprisonment for 29 breaches of orders which restrained the husband from assaulting, harassing or intimidating the wife, contacting her or approaching her home or place of work. The Court held that 'over a three month period the husband subjected his wife to a campaign of terror and violence during which the wife was justified in feeling that her life was in serious danger'. The wife had applied to the Family Court on three occasions for the husband to be dealt with for breaches of the orders. On the first occasion the Court ordered him to enter a recognisance to be of good behaviour for 12 months. On the second occasion after over 20 breaches of the orders including breaking into the home, threatening her life on a number of occasions, tailgating her car and assaulting her, the husband was arrested. He was then released on his own recognisance on a number of conditions. It was only on the wife's third application to the Family Court, after two assaults, including one which was described as a particularly 'serious incident' in a nightclub and which led to stitches to her face, that the husband was sentenced to imprisonment. The Court stated

... instances of family violence should not be seen as less than crimes and that violence must not be trivialized simply because it occurs within a domestic or 'private' context. This view is also reflected in the law's rejection of any distinction between rape within marriage and rape outside marriage. Personal relationships, especially within the family, are rightly protected by privacy, but that privacy must not be allowed to hide violence. Family violence is not a private matter and must be treated seriously by the Courts, not only when prosecuted as a criminal offence in the ordinary way, but also where violence is an element of a breach of an order of the Family Court.¹⁰²⁶

9.74 Nevertheless, concern remains about the Court's application of penalties. The Joint Select Committee noted as a major issue of concern in submissions 'a perceived reluctance on the part of the Family Court to apply penalties which are sufficient to act as a strong deterrent to repeated breach of injunction'.¹⁰²⁷ The report made a number of recommendations aimed at promoting consistent use by the Family Court of the full range of penalties for breach of injunction available under the Act, including a review of penalties imposed for breach.¹⁰²⁸

9.75 *A criminal offence.* The Commission has previously recommended that a wilful breach of an order for personal protection should be a criminal offence.¹⁰²⁹ This has several advantages: it helps to reinforce the message that the violence is not merely a civil matter between the parties; it brings police into the matter; and it relieves the woman from having to instigate proceedings against the man, a matter which may be both

financially and emotionally costly. It also brings the Family Court proceedings in line with State and Territory restraining order proceedings which police may initiate.¹⁰³⁰

Recommendation 9.12

The Family Law Act should be amended to provide that a wilful breach of an order for personal protection under s 70D and s 114 is a criminal offence.

State and Territory protection orders

9.76 **Criticism.** Because of the difficulties experienced with Family Court injunctions many women who have been subjected to violence have preferred to seek protection orders under State and Territory legislation. Nevertheless, the Commission received many complaints about the effectiveness of those protection orders.¹⁰³¹ They included continuing police unwillingness to act on breach,¹⁰³² limitations on the scope of orders,¹⁰³³ inadequate penalties imposed by the courts for breach¹⁰³⁴ and a lack of understanding by law enforcement agencies and legal practitioners of the disempowering effect of violence on women.¹⁰³⁵ Cultural and language barriers make the process of obtaining protection particularly difficult for women from non-English speaking backgrounds and Aboriginal and Torres Strait Islander women.¹⁰³⁶

9.77 **Interstate protection.** Until recently protection orders were not enforceable outside the jurisdiction in which they had been issued. However, following an agreement between Attorneys-General in 1992, legislation has now been enacted across Australia permitting the registration and subsequent enforcement of orders across State and Territory boundaries.¹⁰³⁷ This is a significant improvement but it has not wholly solved the problems. Because the laws on domestic violence are not uniform the situation is confusing. Differences between the Acts include such matters as the persons covered by the order, the duration of orders, penalties for breach and the effects of variation or revocation.¹⁰³⁸ Depending on the jurisdiction to which the woman moves, her original order may or may not be fully enforceable, and at times it may not be clear whether it is or is not. This leaves women in situations of great uncertainty.

9.78 **Reform: towards uniform minimum standards.** There is considerable scope for the further improvement of protection orders under State and Territory laws. It is clear that some laws provide better overall protection than others and are more effective. There is clearly a need for uniform laws throughout the country which contain the best of the existing provisions.¹⁰³⁹

9.79 **The need for a co-ordinated approach.** The existence of effective laws is only one part of a successful approach to stopping violence in the home. It is frequently affirmed that there needs to be a co-ordinated response to violence against women. In the early 1980's in Duluth in the United States of America, the Domestic Abuse Intervention Project was set up. Agencies which dealt with the offenders and with women who had been subjected to violence agreed to develop specific policies and procedures and agreed to monitoring by a central body.¹⁰⁴⁰ The agencies included the police, the court, the women's shelter, probation officers, the jail and mental health agencies. Under the program, arrest of offenders by police is mandatory. Offenders may be sentenced to up to 90 days imprisonment for a first offence and higher penalties for subsequent assaults or breaches of orders are imposed. Advocates visit women who have been subjected to violence at their homes to provide information and assistance. Prosecutors rarely drop charges, even where the woman may be reluctant to proceed. Offenders who are sentenced to probation must undergo long term counselling about their violence. Support and education are also provided for the women. The success of the program in providing a co-ordinated approach to the problem has led to the introduction of a similar program in New Zealand.¹⁰⁴¹ It has also been trialled or is being considered in some Australian States and Territories¹⁰⁴² and much interest in it has been shown.¹⁰⁴³ The NWJP should consider this model in developing best practice procedures for adoption by all States and Territories.

9.80 **Training is essential.** Training is essential to ensure that police treat assault within the family as seriously as assault in other contexts, and that they are aware of the dynamics of a violent relationship, in particular its disempowering effect on its target. While in recent years there have been changes to training and policy in most Australian police forces, more needs to be done.¹⁰⁴⁴ Training of other professionals in the legal system, including lawyers, magistrates and court officers such as registrars, is also essential. Their

attitudes affect the advice they give to women about the options available to them, the support they provide when a woman institutes proceedings and ultimately the penalties imposed on offenders.¹⁰⁴⁵

9.81 **Data collection and research.** There have been numerous calls for ongoing data collection throughout Australia on the outcomes of official interventions in cases of violence against women in the home.¹⁰⁴⁶ This would allow monitoring of cases and responses by service providers and would allow for more meaningful comparisons between different jurisdictions. In its Interim Report the Commission recommended that the promotion and coordination of research and data collection should be an important part of the National Women's Justice Program.¹⁰⁴⁷ Violence against women in the home, including the effectiveness of protection orders, should be a focus of that research and data collection.

Recommendations 9.13

A 'best practice' model for law and procedure relating to protection orders should be developed by the Commonwealth through the National Women's Justice Program and in consultation with State and Territory agencies.

Training about the dynamics of violence against women in the home should be required for police, court officers, lawyers and members of the judiciary and magistracy when dealing with family law and violence matters.

The National Women's Justice Program should promote and coordinate data collection and research about violence against women in the home, including ongoing evaluation of the effectiveness of protection orders.

10. Violence against women and immigration law

Introduction

10.1 Violence against women is a matter of concern in immigration law and practice. DP 54 asked whether women encounter any discriminatory treatment in Australia's immigration laws and policies.¹⁰⁴⁸ The issues raised in the DP included abuse of sponsorship of women as spouses and fiancées; women brought into Australia for the purpose of prostitution; considerations in granting refugee status; and the detention of illegal entrants. Many submissions expressed concern about violence against women who are not permanent residents of Australia and the way in which immigration laws and policies fail to meet their needs. Women without independent residential status who are unaware of their rights under Australian law are particularly disempowered in their ability to leave violent relationships and to seek and receive the protection of the law. This chapter examines violence against women without permanent residency. It deals in particular with the implications in serial sponsorships. The next chapter discusses the situation of women as refugees.

Women without permanent residency status

Categories of entrants

10.2 **Introduction.** Three different situations must be distinguished, although the woman's vulnerability and lack of support apply to each. A woman may marry or form a de facto relationship with her partner while overseas; she may enter as the fiancée of an Australian citizen or resident; or she may come to Australia as a visitor and apply to stay on the basis of her relationship with an Australian citizen or resident. Those who apply to come to Australia as spouses or fiancées are subject to some pre-screening by the Department of Immigration and Ethnic Affairs, as applicants may not travel to Australia without first obtaining a visa. Upon arrival they are granted an entry permit which authorises their stay in Australia.¹⁰⁴⁹ In each case the relationship must be or must be intended to be genuine and continuing.

10.3 **Marriage before entry.** If a woman is married overseas to or forms a de facto relationship with an Australian citizen or resident, she can apply for a spouse visa and entry permit.¹⁰⁵⁰ Subject to the usual requirements, such as checks on her health and character and a determination that the marriage is a genuine one, she acquires permanent residency status on entry. Should the relationship break down, her residency status is generally unaffected unless it is later established that the marriage was not genuine or that false or misleading information was included in the application.

10.4 **Fiancées.** If a woman is sponsored as a fiancée, she will be granted a Prospective Marriage Entry Permit on arrival in Australia.¹⁰⁵¹ This authorises her stay for six months from arrival.¹⁰⁵² She must marry the sponsor within that time and then apply for permanent residence on the basis of the marriage. If she fails to marry within the six months her entry permit will expire and not be renewed, and she will have to leave Australia. If she remains in Australia she becomes an illegal entrant and is liable to deportation.

10.5 **Visitors and other temporary entrants.** A woman may enter on a temporary entry permit, for example, as a visitor, and subsequently marry or form a de facto relationship with an Australian citizen or resident.¹⁰⁵³ The woman can then apply for permanent residence and, provided that the relationship is assessed as genuine and continuing, will be given a temporary entry permit (an Extended Eligibility Spouse Entry Permit) for two years.¹⁰⁵⁴ After that time permanent residence may be granted provided that the relationship is still genuine and continuing. There are some limited allowances where the relationship has broken down within the two year period owing to domestic violence. These are discussed below.¹⁰⁵⁵

Genuine and continuing relationships

10.6 The matters to be taken into account in determining whether a relationship is 'genuine and continuing' are set out in departmental guidelines.¹⁰⁵⁶ The principal elements include 'a level of mutual support and co-operation in financial, social and domestic matters' and 'an intention that the relationship should be lasting and exclusive'. Factors listed for consideration by departmental officers include joint ownership or leasing of property, the operation of joint bank accounts, major joint purchases, the making of wills in each other's favour and knowledge of each other's background and circumstances. Weight is also given to the duration of

the relationship. In those relationships which are characterised by unequal power and financial abuse, the listed factors will work against a woman who, despite their absence, nevertheless had a genuine commitment to the marriage.

Sponsorship

10.7 Introduction. In each of three categories of visa outlined above, the woman's partner is required to sponsor her application. In general terms, sponsorship is an undertaking by an Australian citizen or resident to assist another person, financially and with accommodation, during her or his first year in the country.¹⁰⁵⁷ In certain cases, an Assurance of Support may be compulsory. This operates as a guarantee for reimbursement to the government where the sponsored person claims particular social security benefits during the first two years in Australia.¹⁰⁵⁸ A bond may also be required.¹⁰⁵⁹ In the case of spouse and fiancé visas, a request for an Assurance of Support is discretionary.¹⁰⁶⁰ It is often compulsory, for example, if the sponsor is on social security benefits. However, no bonds are required for spouses and fiancées. Where an application for entry has been refused, the applicant's sponsor may appeal against the decision. Where the applicant is in Australia and has applied for a change in residency status, the applicant may appeal, provided he or she is legally in Australia.

10.8 Sponsorship of spouses and fiancées. The number of spouses and fiancées sponsored to Australia has grown markedly over the last decade to approximately 17 000 a year.¹⁰⁶¹ About two thirds of these are women and most are sponsored as spouses.¹⁰⁶² There are particularly high ratios of women to men for spouses and fiancées from Thailand, the Philippines and other South-East Asian countries compared with other parts of the world.¹⁰⁶³ Although detailed information on the circumstances of these relationships is not kept, the figures suggest a growth in intercultural marriages, particularly from Asia.¹⁰⁶⁴ By the late 1980s the Philippines had become the second largest source of spouses and fiancées for Australians.¹⁰⁶⁵ It was estimated in 1992 that 15 000 to 20 000 Australian men had Filipino spouses.¹⁰⁶⁶ In recent years, the number of women from former Eastern bloc countries migrating as spouses or fiancées has also risen.¹⁰⁶⁷

10.9 Concerns about sponsorship. There have been public concerns since the 1980s that some men are misusing spouse and fiancée sponsorship arrangements and are abusing the women they sponsor.¹⁰⁶⁸ Most sponsorship arrangements involve genuine relationships and do not lead to abuse. Relationships break down for various reasons. However, the incidence of violence, particularly where a man has sponsored a number of women, must be acknowledged. The Iredale Report identified 110 repeat sponsors (that is, sponsors of more than one spouse or fiancée) whose relationships were characterised by high rates of marriage breakdown, domestic violence and lack of financial support for the woman and her children.¹⁰⁶⁹ Submissions to the Commission reported that women's refuges regularly provide shelter to women who have been sponsored by Australian men and subjected to violence.¹⁰⁷⁰ The Commission was also told that since 1987 the Centre for Philippine Concerns-Australia has documented 23 cases of murder or suspected murder of Filipino women (including three daughters).¹⁰⁷¹ Concern is not confined to women from the Philippines, although that group has been the subject of the most research and comment. More recently concerns have grown about abuse of women sponsored from other countries such as Thailand, Indonesia and Fiji.¹⁰⁷²

10.10 Lack of comprehensive statistics. It is difficult to ascertain the extent of violence against sponsored women because of the lack of detailed research and data collection.¹⁰⁷³ The problems in obtaining information from the women were acknowledged in the Iredale Report¹⁰⁷⁴ and were noted in a number of submissions both in this reference and in *Multiculturalism and the law*.¹⁰⁷⁵ Factors such as language difficulties, family loyalty, the shame felt when a marriage breaks down and mistrust of outside help can make it very difficult for immigrant women to seek aid.¹⁰⁷⁶ The *Iredale Report* called for continuing research into the nature and extent of domestic violence perpetrated by spouse and fiancée sponsors. The Commission endorses this recommendation. However, on the basis of evidence presented to it and from previous reports, the Commission considers that in addition certain measures must be taken as soon as possible.

Violence

10.11 Vulnerability to violence. A woman who immigrates to Australia as a spouse or fiancée, or who enters on a visitor's visa and applies to stay on the basis of a relationship with an Australian, can find herself in a particularly vulnerable position if her partner is violent.¹⁰⁷⁷ Experiences vary according to the woman's

ethnicity, her education, her fluency in English and the availability of support.¹⁰⁷⁸ However, there are many common elements. There can be significant power imbalances in such relationships. Studies of Filipina/Australian marriages have shown that they are characterised by an age difference of between 10 and 20 years between the woman and her partner, her lack of familiarity with Australian culture, her lack of knowledge of her rights under Australian law and her isolation from friends and family.¹⁰⁷⁹ Submissions to the Commission said that violence against these women is a particular problem in isolated areas such as far north Queensland, north-west Tasmania and the north of Western Australia, where there is very little contact with people from the same cultural background.¹⁰⁸⁰

10.12 Experience of violence. Violence against these women includes physical, sexual, emotional and psychological abuse.

I was still shy, easily frightened and a bit naive when I arrived here. For example, when I ask him to teach me how to use the washing machine, he would get angry with me. He would shout at me, 'You're stupid. you don't know anything; what to do.' If only it was just words; he would complement this with violence. He struck me often on the head with his heavy hands . . . If I ask him to repeat or explain to me some words, he would scream and slap me on the neck again. He also repeatedly called me a liar . . .

*When it came to lovemaking, he would force me to perform obscene acts he saw on video. He treated me like a plaything or an animal . . . If I didn't agree, he would hit me . . . I lived those days with the fear that he might kill me. I tried everything to placate him. The one thing constant was fear.*¹⁰⁸¹

Submissions reported that financial abuse is particularly high in these relationships.

*. . . most women never see any money at all . . . It can be equated to the slave trade of the past. These women work for nothing, are abused emotionally and sexually and they see no way out. Australia may as well import women and have men line up at the local airport to select the women they want.*¹⁰⁸²

Access to economic independence is crucial for women escaping violent situations. Women without permanent residency are, with limited exceptions, not entitled to social security. This makes an escape from violence even more difficult, particularly in regard to longer term crisis accommodation.¹⁰⁸³ Submissions also noted that recognition of qualifications obtained overseas and access to education and employment are important ways in which women gain economic independence and access to information.¹⁰⁸⁴ While the reforms proposed in this chapter relate only to immigration laws and policies, the broader issues must not be forgotten.

10.13 The threat of deportation. The threat of deportation is often significant in inducing women to stay in abusive relationships, particularly where no information about their options is readily available.¹⁰⁸⁵ While deportation is only a possibility if the marriage or de facto relationships was not genuine or if false or misleading information was provided in the application, the threat of it may be powerful where women are not aware of their legal rights. This may be particularly so where the woman's grasp of English is limited and her partner has helped her to fill in her immigration forms. Fear of deportation also precludes many women from actively seeking assistance from government agencies.¹⁰⁸⁶ A worker with migrant communities explained

. . . we see so many cases where this threat of possible deportation provides a strong incentive for a woman to stay in an abusive marriage. Frequently, this lack of permanency forms the basis of blackmail and threats by an abusing partner to get the woman to stay with him. Or he tells her that if she doesn't do what he wants or tells anyone about the abuse, he will throw her out and tell Immigration that the marriage has 'broken down' and she will be deported. In most of these cases, of course the woman lacks the 'documentation' to substantiate her case, that is even assuming she had

An international issue

10.14 ***Human rights law.*** The right to marry and found a family is an important human right recognised in international law.¹⁰⁸⁸ No unreasonable or arbitrary restrictions should be imposed on this right. Equally important is a woman's right to be free from violence and exploitation.¹⁰⁸⁹ Where it can be established that this right is threatened, reasonable measures of protection are required. The way in which a country treats its non-citizens is a measure of its respect for human rights. The situation of women sponsored as spouses and fiancées who become exposed to violence has been likened to trafficking in women, particularly where agencies have been involved in arranging introductions.¹⁰⁹⁰

10.15 ***International conventions.*** International human rights conventions do not expressly address abuse of sponsorship practices but several contain provisions relevant to this situation. Trafficking in women and exploitation of prostitution of women are prohibited by the *Convention on the Elimination of All Forms of Discrimination Against Women*.¹⁰⁹¹ The *Declaration on the Elimination of Violence Against Women* includes trafficking in women in its definition of violence.¹⁰⁹² It requires states to prevent, investigate and punish acts of violence against women, and to adopt measures to eliminate violence against women who are particularly vulnerable.¹⁰⁹³

Domestic violence provisions

10.16 ***Special provisions.*** In response to lobbying from women's groups about the special vulnerability to domestic violence of women in Australia without permanent residency status, there have been some changes to migration law. A two year period of temporary residence was introduced in 1991 for people who entered Australia on a temporary basis, such as visitors, and applied to change their status on the basis of a marriage or a de facto relationship. Those who have been subjected to violence by their partners may obtain permanent residency where the relationship has broken down within the two year period. In December 1992 these provisions were extended to women who were sponsored as fiancées, who had married and had lodged an application to stay permanently and whose marriage subsequently broke down because of domestic violence.

10.17 ***Proof of domestic violence.*** An applicant for permanent residency on the basis of a relationship (spouse or de facto spouse) with an Australian citizen or permanent resident must establish that the relationship is 'genuine and continuing' at the time of application. At the time of decision, the applicant must also show either that the relationship is continuing or that, among other grounds,¹⁰⁹⁴ the relationship has broken down and

- an injunction under the Family Law Act or protective order¹⁰⁹⁵ under State/Territory legislation has been made against the spouse; or
- the spouse has been convicted of an offence of personal violence against the applicant.

Between November 1991 and 31 October 1992, 43 claims were made under the provisions.¹⁰⁹⁶

10.18 ***Problems with the provisions.*** The provisions go some way towards assisting women who have been subjected to violence. However, the fact that these provisions require a court order presents difficulties. There is evidence that the incidence of domestic violence is under-reported, particularly amongst migrant women.¹⁰⁹⁷ Women from different cultures may be especially reluctant to approach the police, particularly where they are afraid of being deported. Magistrates may refuse to grant an order where they are not satisfied that the woman has reasonable continuing fear, for example, if she has moved away from her partner to another State. Lawyers may advise a woman to accept undertakings rather than pursuing an order, without being aware that this will prejudice her access to the provisions.¹⁰⁹⁸ Where charges of assault are brought against her partner and the woman's entry permit has expired, her residency status will be in limbo pending the outcome. Resolution may take considerable time and in the interim she may be without any financial support.¹⁰⁹⁹

10.19 **Credibility.** Several submissions said that women from other countries often have their credibility questioned when they report that their partners have been violent. It was suggested that police are often unaware of the complex issues involved in sponsorship, that some police believe that women fabricate domestic violence as a means of gaining permanent residency¹¹⁰⁰ and that they make discriminatory comments.¹¹⁰¹ In rural areas where the man is known to and friendly with police, there may be little or no support for the woman when she complains of violence. Defendants to charges of violence may also claim that the woman is lying to establish a claim for permanent residence.

*An unintended consequence of the immigration provisions has been that where the woman's application for an Apprehended Violence Order goes to a defended hearing, the defendant often claims that the woman is applying for an order so that she may remain in Australia, and not due to any fear on her part.*¹¹⁰²

Concerns were also raised about departmental attitudes where conflicting evidence about the relationship is given by the applicant and the sponsor following her allegations of his violence.¹¹⁰³

*[In one case] the decision maker determined that the information given by the applicant was not credible because it conflicted with information given by the [sponsor]. This information was volunteered by [him] after the relationship had broken down due to violence and police had commenced proceedings for a protection order . . . his version of the matters . . . conflicted with information given by the applicant about the circumstances surrounding the beginning of the relationship and the decision to marry. The protection order was subsequently granted. Shortly afterwards the Department of Immigration and Ethnic Affairs refused the application for a permit on the basis that the relationship was not genuine . . . the domestic violence provisions did not come into play as she had been determined not to meet the threshold criteria. There was nothing to prevent the decision maker from forming a decision as to who should be believed.*¹¹⁰⁴

10.20 **The importance of training.** Decision-makers must be sensitive to issues surrounding domestic violence, particularly the nature of the abuse and its disempowering effect on the victim. Each Regional Office of the Department of Immigration and Ethnic Affairs now has one Domestic Violence Contact Officer who has undergone special training,¹¹⁰⁵ and whose role is only to provide information to clients. All decision-makers need to be aware of the issues in relevant cases.

Recommendation 10.1

Training about the nature and effects of domestic violence should be provided to assist decision makers where conflicting evidence about the nature and history of a relationship is presented following its breakdown.

The need to extend the provisions

10.21 **Proposals about evidence of domestic violence.** Women from other countries face particular problems in obtaining access to the legal system, because of issues such as ignorance about their legal rights, unfamiliarity with the legal system, and cultural and language barriers.¹¹⁰⁶ They can be disadvantaged when they cannot fit the criteria because there is no order or conviction. The committee which reviewed the domestic violence provisions recommended that consideration should be given to extending the provisions to make evidence of domestic violence given by health and welfare professionals, community workers and police officers sufficient grounds to permit permanent residency, even if there is no order or conviction.¹¹⁰⁷ Submissions to the Commission also proposed that evidence from suitable third parties with whom the woman may feel more comfortable should be sufficient.¹¹⁰⁸ The current guidelines have the advantage of providing an objective criterion for decision-makers. Any widening of the categories of acceptable evidence would require them to exercise more discretion. However, departmental officers are required to exercise discretion in making many decisions at present, and the Commission does not consider that this is a barrier, provided that training in domestic violence issues is provided.

Recommendation 10.2

The provisions for the grant of permanent residency to temporary entrants who are subjected to domestic violence should be extended to include cases where evidence of domestic violence is available from community and welfare workers, medical and legal practitioners and other suitable third parties.

10.22 *Children.* A woman may flee the relationship because of fears for her children. However, violence or threats of violence against a child of the applicant will not bring the domestic violence provisions into operation. It has been recommended that the provisions should include the breakdown of a relationship following the sexual assault by the partner on a child of the relationship.¹¹⁰⁹ However, this qualification is too narrow. The provision should not be limited to sexual assault and the woman should not have to wait for an actual assault on her child to gain the protection of the law. A real risk of assault should be sufficient.¹¹¹⁰

Recommendation 10.3

The domestic violence provisions should be extended to include cases where there is evidence of violence or a real risk of violence by the sponsor against a child of the woman.

The special position of women who enter as fiancées

10.23 *Required to marry within six months.* A woman sponsored as a fiancée is required to marry within six months of arrival or she must leave the country.¹¹¹¹ She will not gain the benefit of the domestic violence provisions if she has not married because the threshold test, that there is a genuine and continuing relationship, has not been met. It was argued that these provisions operate to treat women as a commodity in that if the relationship does not work out the woman can be sent back to her country of origin.¹¹¹² The Iredale Report noted that some men 'have been heard to boast about having had a "housekeeper, cleaner, cook and sex partner for three months with the only cost being a one-way airfare"'.¹¹¹³ This is psychological and emotional abuse of the woman who has come to Australia in good faith, particularly if she has become pregnant within this time.

I trusted him wholly because I didn't know the situation here. I trusted that we would get married here because he took me from the Philippines in a decent manner. . . Weeks passed and I kept wondering because he wasn't making a move to organise our wedding. By this time, I was already pregnant. It seemed he had forgotten everything. Once when I asked, his reply cut through me like lightning, 'I don't know. I changed my mind. I don't want to marry you. I want you to go back to the Philippines. I don't want to marry you any more.' It was as if the skies caved in on me . . . I wanted to die . . .

*Even if I wanted to go back to the Philippines, I couldn't face my parents and I was jobless and everything . . . You know how conservative it is in our place. They wouldn't understand; it's like you're the one at fault. You will be humiliated in your family's and people's eyes because they would think you've tainted the honour which is so valued there.*¹¹¹⁴

Women who have entered as fiancées and have married may still be in a vulnerable position if the relationship breaks down before their application for residence is lodged. The domestic violence provisions will not apply because the relationship is not 'genuine and continuing' at the time of application.¹¹¹⁵

10.24 *Proposals for change.* Submissions called for review of the provisions to remedy the vulnerable situation fiancées may find themselves in when their partner refuses to marry them or to nominate them for permanent residency.¹¹¹⁶ One important measure is to ensure that women are provided prior to their departure with sufficient information to make an informed choice about entering such arrangements.¹¹¹⁷ However, while prior information is crucial, it does not help those women who have come to Australia and find themselves in a violent relationship, unmarried, sometimes pregnant and afraid or ashamed to return to their home country. They should not be penalised because their choice resulted in an abusive relationship. Fiancées whose relationship broke down before marriage because of violence and those women whose

marriage took place but broke down before lodgement of their application for permanent residence should have the benefit of the domestic violence provisions on the same basis as those women who have married and lodged an application.

Recommendation 10.4

Similar provisions concerning the breakdown of the relationship because of domestic violence should apply to women who have been sponsored as fiancées, whether the breakdown occurred at any time before marriage, or after marriage but before an application for residence has been lodged.

Access to information

10.25 A crucial issue is the woman's access to information to enable her to make an informed choice about coming to Australia and, after her arrival, to information, services and options should it become necessary to escape a violent relationship. There may be a particular need for a woman to be given financial information, particularly where her partner is a pensioner or benefit recipient.¹¹¹⁸ There is also a need for basic information about her rights under Australian family law. This is discussed further at paragraph 10.44 in the context of serial sponsorship.

Serial sponsorship

Introduction

10.26 While any woman whose permanent residency status is dependent on her partner is vulnerable to violence, there is evidence that this is particularly so where the partner has sponsored a series of women from overseas.¹¹¹⁹ There is no limit on the number of times a person may sponsor a spouse or fiancée. The National Strategy on Violence Against Women called on all governments to encourage legislative and administrative reform to eliminate all forms of violence against women. It referred particularly to exploitation and abuse of women by serial sponsors.¹¹²⁰

Serial sponsorship to Australia

10.27 ***Serial sponsorship defined.*** There are different definitions of what is meant by 'serial sponsorship'. The Iredale Report distinguishes between those who have sponsored more than one spouse or fiancée (called 'repeat' sponsors) and those repeat sponsors where at least one of the relationships has involved abuse or exploitation. Only this second category was defined as serial sponsorship.¹¹²¹ A broader notion of serial sponsorship defines the very act of ending the relationship after a short time and repeating the process by sponsoring another woman as abusive. On this view substantiation of violence in a previous relationship is not necessary.¹¹²²

10.28 ***The extent of serial sponsorship.*** The Department of Immigration and Ethnic Affairs does not keep statistics on the number of sponsorships by individuals. It is difficult, therefore, to obtain an accurate picture of the extent of this practice. However, reports and submissions to the Commission suggest that repeat sponsorship is not uncommon. The Iredale Report identified 110 repeat sponsors, of whom 53 had sponsored on two occasions and 57 had sponsored at least three partners. The maximum number of women sponsored by any one person in that study was seven. Eighty of those repeat sponsors were known to have subjected their partners to violence.¹¹²³

10.29 ***Human rights issues.*** Where a man has previously sponsored women as spouses or fiancées and has abused them, two important human rights issues are raised: a woman's ability to make a full and informed choice about marriage to him and Australia's international obligations to stop abuse and exploitation of women. Violence against women by their partners affects not only the women but the children born to those relationships.¹¹²⁴ It also imposes demands on government and community resources when women are forced to flee abusive relationships. Cases have been reported where the man sponsors another partner to Australia while his previous partner and children become dependent on government support without financial support from him. As one worker with migrant women noted,

*I and other workers are fed up with seeing NESB women married to Australian professional batterers.*¹¹²⁵

10.30 **Checks before immigration.** An applicant for immigration faces stringent checks on her health, background and character to ensure she is not a public health risk or security risk. However, the sponsor is only assessed in terms of being legally free to marry and his capacity to meet the undertakings of support involved in sponsorship. He will be interviewed only for these purposes and to assist the decision-maker to determine whether the relationship is genuine.

10.31 **Options for change.** A number of approaches might be taken to help to protect women from abuse by serial sponsors. The sponsor could be required to supply information to the Department and the woman about his previous sponsoring record and/or any history of violence. She could then make an informed choice about marrying. In the past collection of this information has been resisted as unnecessary to assessing the applicant's character and background for immigration to Australia and as infringing the sponsor's right to privacy.¹¹²⁶ A second option is to limit an individual sponsor's opportunities for repetition, for example, by prohibiting more than two sponsorships, unless exceptional circumstances apply,¹¹²⁷ or by prohibiting any sponsorships where there has been violence against a previous partner.¹¹²⁸ A third is to provide disincentives to repeat sponsorships, for example, through imposing a bond.

Privacy implications of data collection

10.32 **Privacy versus protection.** The right to privacy is a recognised human right¹¹²⁹ and is given protection under the *Privacy Act 1988* (Cth). Gathering information about the sponsorship history and criminal record of the sponsor, whether or not that information is supplied to others, raises privacy issues for the sponsor. There is conflict, however, between the man's claim to personal privacy and the right of a woman to personal protection. It is a question of balancing one individual right against another. In regard to serial sponsorship, there are good grounds for holding that the woman's right to safety and personal integrity should outweigh the man's right to privacy about his history of violence. However, the balance is currently weighed in favour of the abuser.

10.33 **Current practice.** The current off-shore sponsorship form requires a sponsor to provide details of previous sponsorships and of how those relationships broke down.¹¹³⁰ Since the applicant must lodge the form at the same time as her application for migration, this information is available to her. However, her knowledge of English may be limited and she may not understand the information. She may rely on the sponsor to interpret the form for her and he may disguise its contents. If he has lied about his previous relationships, the Department does not advise the applicant of this and it does not prosecute him for supplying false and misleading information, although that option is open under the *Migration Act*.¹¹³¹ The Department takes into account a history of violence or a sponsor's false statements in assessing whether the relationship is 'genuine and continuing'.¹¹³²

10.34 **Privacy Act.** The *Privacy Act 1988* (Cth) regulates the collection, use and disclosure of information collected by government through Information Privacy Principles (IPPs).¹¹³³ IPP 3 provides that the collection of the information should not intrude 'to an unreasonable extent' on the personal affairs of the individual. IPP 2 requires the individual who is asked to supply information about himself or herself to be notified of the purpose of collecting the information, whether collection is authorised or required by law and anyone to whom the information is likely to be passed. This requirement is easily addressed by the inclusion of a notice with the sponsorship form. IPP 10 limits the use of personal information unless, among other things, the person consents, the use is required or authorised by law or the purpose for which it is used is directly related to the purpose for which it was obtained. The collection and use of information about serial sponsors could be so arranged that no IPP was infringed. However, it would be better to amend the *Migration Act* to authorise the Department to collect and use this information. This would put beyond any doubt that the collection of relevant information about sponsors is necessary to prevent abuse of sponsorship arrangements.

10.35 **Current procedures for collecting data on prior sponsorships.** Departmental posts throughout the world collect data on prior sponsorships. However, collection is incomplete. Each post collects data only in relation to applications it handles. There is no cross-checking where women from different countries are

sponsored. With the exception of the Manila post, data is also being collected only from the date of implementation of the scheme rather than from departmental records which provide historical information.¹¹³⁴ The Iredale Report recommended that urgent consideration be given to implementing procedures to monitor spouse and fiancé sponsorships to identify serial sponsors of concern.¹¹³⁵ The Department has stated that it is taking steps to enhance its capacity to record sponsor details and to monitor sponsor activity.¹¹³⁶ This will eventually make data on sponsors available through a centralised database.

Recommendation 10.5

The Department of Immigration and Ethnic Affairs should ensure as a matter of priority that data on previous sponsorships by an individual are collected and available to all posts from a centralised database.

The sponsor's record

10.36 ***Repeat sponsors.*** The number of spouses and fiancés sponsored each year is now quite large. More than a third of those sponsors are women.¹¹³⁷ The Commission does not consider it necessary for all sponsors to be required to supply information about any background of violence. However, more effective action is necessary to stop the abusive practices of some men who sponsor a series of women and subject them to violence and abuse. Accordingly the Commission proposes that, where a person has sponsored one or more previous spouses or fiancés, and seeks to sponsor another, the Department should inquire how the previous relationship or relationships broke down and whether the sponsor has any history of relevant criminal offences or restraining orders issued against him. This raises privacy issues for other agencies such as the police.

10.37 ***Data from other federal agencies.*** When the Department seeks information from other federal agencies, such as the Australian Federal Police or the Family Court, about a sponsor's record of violence, those agencies will also be bound by the *Privacy Act*. IPP 11 prevents the disclosure of information unless, among other things, the person has consented to the disclosure, the disclosure is authorised or required by law or it 'is necessary to prevent or lessen a serious and imminent threat to the life or health' of another person. Arguably the risk to a woman of violence by her partner could fit within this third exception but it might not be considered imminent. Any difficulty these agencies would have in releasing the information to the Department of Immigration and Ethnic Affairs could be overcome simply by requiring the person, as a condition of sponsorship, to consent to the disclosure of the information, or alternatively by authorising it in the *Migration Act*.¹¹³⁸

10.38 ***Data from State and Territory agencies.*** Information about a serial sponsor's convictions for crimes of violence, such as assault and sexual assault, and records of restraining orders taken out against him and any breaches of those orders, will also be relevant. While State and Territory police forces are not bound by the *Privacy Act*, they usually have their own confidentiality requirements. Where a man is seeking to sponsor a second spouse or fiancée he should be required to obtain and lodge with the application a certificate from the police force of any jurisdiction in which he has resided during the last ten years. That certificate should detail only relevant material, that is, any restraining order issued against the sponsor, any breaches of that order, and any criminal convictions in the past ten years for offences of personal violence.¹¹³⁹ This requires no more of the sponsor than of the woman applicant. She is already required by law to obtain and lodge with her application a certificate from the police in her country of origin which details any criminal convictions.

Recommendations 10.6

The Migration Act should be amended to provide that in order to address the problem of serial sponsorship, the Department of Immigration and Ethnic Affairs is authorised to collect information about a sponsor's previous sponsorships of spouses and fiancés and, where there is at least one prior sponsorship, any record of violence.

Where there has been at least one prior sponsorship of a spouse or fiancé the Department of Immigration and Ethnic Affairs should investigate whether injunctions for personal protection

or restraining orders have been made against the sponsor, whether there have been any breaches of those orders and whether he has any criminal convictions for offences of personal violence. The sponsor should be notified of the purpose of collection and use of the information when lodging the application to sponsor.

Providing information to the applicant

10.39 **A fully informed choice.** International conventions provide that marriage shall be entered into only with the full and free consent of both parties.¹¹⁴⁰ In the context of the law relating to the validity of marriage, where the absence of consent renders a marriage void, the requirement of 'consent' has been interpreted very narrowly.¹¹⁴¹ The serious consequences of lack of consent require this strict approach to validity. However, it is not necessary in other areas of law. It is possible to give a broader interpretation to international conventions as imposing a positive duty on states, in certain situations where they have special responsibility, to ensure that consent is full and free in the broad sense of being fully informed of relevant issues. A broader interpretation argues that 'a marriage entered into without knowledge of the husband's past convictions for violence, or past sponsorship of other women, is a marriage entered into without informed consent'.¹¹⁴² A government need not make inquiries of all intending spouses or pass on information about violence in all cases. However, because of its obligations under international human rights conventions and its constitutional responsibility for immigration, the Australian government has a special responsibility to immigrant women who are particularly vulnerable to abuse and the consequences of abuse. It should assist them to exercise their right to a fully informed choice in marrying.

10.40 **Providing information about the sponsor to the applicant.** To overcome any uncertainties under the *Privacy Act*, the Department of Immigration and Ethnic Affairs should have a positive obligation under the migration legislation or regulations to disclose to the applicant information about a repeat sponsor's past sponsorships of spouses and fiances and any history of violence of which it is aware.¹¹⁴³ Departmental staff should ensure in a confidential interview prior to emigration that the applicant is aware of the significance of these matters.¹¹⁴⁴ This will assist her to make an informed choice about her application. The Commission is aware of the view that 'counselling on the past record of a potential sponsor before migration is of limited benefit in persuading women not to migrate for marriage purposes'.¹¹⁴⁵ However the Department has a responsibility which it must discharge. The limited effectiveness of interviews underlines the importance of support once the person is in Australia. Departmental staff must be trained properly to handle these sensitive issues.¹¹⁴⁶

Recommendations 10.7

Where a prospective sponsor's record shows past violence or previous sponsorships, that information should be drawn to the attention of the applicant by a departmental officer in an individual interview. The information must be provided in a culturally and linguistically appropriate manner and the interviewer must be satisfied that the applicant understands the nature of the information provided.

Departmental officers who are involved in processing applications involving spouse and fiance sponsorship should be trained properly to handle the sensitive issues which might arise, particularly in interview procedures. Training in cultural awareness and cross-cultural communication skills is essential.

In view of the sponsor's duty to disclose relevant information, the Department of Immigration and Ethnic Affairs should prosecute sponsors who supply false or misleading information.

10.41 **General information prior to departure.** Information about legal rights, financial matters, domestic violence and community services available in Australia must be provided to women who are immigrating both before departure and once in Australia.¹¹⁴⁷ Some measures have been introduced in the Philippines to address some of these concerns. Since 1989 the Philippine Government has required all persons intending to emigrate as spouses or prospective spouses to attend counselling at the Commission on Filipinos Overseas about such matters as cultural differences, their rights, and available support and welfare services in the

country of destination. The Manila office of the Department of Immigration and Ethnic Affairs requires proof of the woman's attendance at this counselling before processing her application for immigration to Australia. Similar measures should be introduced in other posts where women are immigrating as spouses and fiancées, particularly where some concern about serial sponsorship exists. General information sessions at an early stage in processing applications should include information about legal rights and community services, particularly in relation to domestic violence. Video presentations in post waiting rooms could include reference to these issues.

Recommendation 10.8

General interviews of applicants for immigration as spouses or fiancées, including information as to their legal rights, should occur at an early stage in the application process.

Other proposals

10.42 **Financial commitment by the sponsor.** It has been suggested that requiring a financial commitment on behalf of the sponsor, at the very least where there has been a previous sponsorship, may provide some disincentive to abuse of sponsorship arrangements.¹¹⁴⁸ The Iredale Report recommended investigation of the feasibility of requiring a bond, which could then be used to offset costs incurred for the crisis and post-crisis services resulting from serial sponsorships.¹¹⁴⁹ However, this proposal would disadvantage poorer people and reinforce the notion of financial dependency of the applicant.¹¹⁵⁰ It also presents practical difficulties, for example, if the couple separate and later reconcile. For these reasons the Commission prefers other approaches which will directly assist women who are sponsored.

10.43 **Banning further sponsorships.** Groups have previously recommended that a limit be placed on the number of times a person could sponsor a spouse or fiancée from overseas.¹¹⁵¹ The Commission does not support the imposition of a limit at this stage, partly because of the difficulties which would be occasioned by its recommendation for less stringent approach to substantiating violence under the domestic violence provisions. Instead it would prefer to see measures to ensure that the woman is fully informed of a repeat sponsor's history of sponsorships and any relevant court orders or convictions involving violence and increased emphasis on support provided to women after migrating to Australia.

10.44 **Services after migration.** Immigrant women in a violent relationship must have access once in Australia to information and advice about their legal rights and the services available to them. Information must be culturally and linguistically appropriate. Fear and shame about the breakdown of the marriage or plans to marry prevent many women from seeking help, particularly when they have become pregnant. Contact with community organisations and support services is an important first step to break the isolation. The Department has taken valuable steps in providing funding under its Grant-in-Aid program for ethnic community agencies, to assist immigrants to settle. It also provides some information to new arrivals, including the names and addresses of legal advice centres, women's organisations and ethnic welfare agencies.¹¹⁵² Information is distributed to addresses on passenger cards and through other agencies such as libraries. However, more remains to be done to ensure that women receive information and support, particularly where they are in isolated areas or have changed address. Community language radio programs are particularly important for women from a non-English background. Funding for community groups must also be maintained.

Recommendation 10.9

Information about legal rights, particularly in relation to family law, domestic violence and deportation, should be made available to immigrants by service providers, with special attention to women in remote areas. Written information should be available in different languages and the use of community radio should be encouraged.

11. Violence and women's refugee status

Introduction

Women as refugees and displaced persons

11.1 Seventy per cent of the world's 18.2 million refugees and displaced persons are women and children. In spite of this, the persons chosen overseas for resettlement in Australia on refugee and humanitarian grounds are predominantly male,¹¹⁵³ as are the majority of individuals accorded refugee status after arrival in the country.¹¹⁵⁴ The overall proportion of female principal applicants in the entire Refugee and Humanitarian program has increased from 20 per cent in 1982-83 to over 30 per cent at current levels.¹¹⁵⁵ In DP 54 the Commission questioned the adequacy of the protection given to women both at international law and within Australia's refugee and humanitarian programs. In this Report the issue is examined by reference to women who have been victims of violence, in particular sexual violence. Some wider issues of gender bias in refugee law and practice are also considered.

Principles of international law

11.2 *Who is a refugee?* The primary source of international obligation towards refugees is the UN *Convention relating to the Status of Refugees 1951* (the Refugee Convention) to which Australia is a party. Under the Convention parties undertake to grant a degree of protection to persons on their territory who fulfil the definition of refugee. The term 'refugee' has a distinct meaning at international law. Article 1A of the Refugee Convention, when read with the 1967 *Protocol Relating to the Status of Refugees*, defines a refugee as a person who

owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside of the country of his former habitual residence as a result of such events, is unable or, owing to such fears, is unwilling to return to it.

This definition has proved to fit more readily the activities of men who seek protection than those of women.¹¹⁵⁶ The problems of applying this definition to the experiences of women refugees has been under active consideration in recent years.¹¹⁵⁷

11.3 *Other sources of international obligations.* Ensuring the protection of refugee women is required not only by the 1951 Convention and its 1967 Protocol but also by other relevant international instruments such as the *Universal Declaration of Human Rights*; the 1949 Geneva Conventions on the Laws of War and the two Additional Protocols of 1977; the 1966 Human Rights Covenants; the *Convention on the Elimination of All Forms of Discrimination Against Women*; the *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*; the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*; the *Convention on the Nationality of Married Women*; and the *Convention on the Rights of the Child*. Australia is committed to all of these instruments. They provide a framework of international human rights standards for protection of and assistance for refugee women.¹¹⁵⁸

Problems faced by women refugees

How women become refugees

11.4 *Types of persecution suffered by women.* Women may fear persecution in similar circumstances to men. However there are forms of persecution that principally affect women. For instance women are more likely than men to be persecuted because of kinship, that is, because of the status, activities or views of their spouses or male relatives. They may be sexually harassed to obtain information about, or a confession from, a male relative. They may have political opinions imputed to them based on the activities of members of their families. Women may have to flee because the authorities are unwilling or unable to protect them from sexual violence, by public officials or private citizens.¹¹⁵⁹ Sometimes having been subjected to sexual assault they are liable to inhuman treatment from their community if they return home.¹¹⁶⁰

11.5 Systematic sexual violence. At times, especially during civil war, women have been subjected to campaigns of sexual abuse and torture. The UN High Commissioner for Refugees (UNHCR) recently expressed concern about the persistence of systematic sexual violence against women and girls. The report referred to large scale refugee situations on two continents causing members of particular groups to flee. A field report on one group of nearly 300 000 people stated

with little hesitation and great consistency both the men and the women interviewed stated that their reason for leaving was to ensure the safety of the women. The surge in arrivals [in the country of asylum] appeared to be directly related to an increase in the incidence of rape. The victims' ages ranged from 15 to 52 years. The rape experience typically involved several perpetrators and often several incidents. Sometimes the military would take groups of women to their encampments. As many as thirty women would be taken at a time and kept from several days to a week. More often, however, the victims would report being raped in their homes, sometimes while a male family member was present. The interviewees explained that, in the face of heavily armed soldiers, any resistance was futile.¹¹⁶¹

11.6 Gender-related persecution. Women are also persecuted simply because of their gender.¹¹⁶² Some countries continue to deny women basic human rights across a range of political, social and cultural areas. Cultural practices such as genital mutilation, infanticide, sati (the practice of burning a widow on her husband's funeral pyre), bride-burning, forced abortion, forced marriage and forced sterilisation are practised in different parts of the world.¹¹⁶³ They may be punished for failure to conform to harsh and discriminatory laws or practices which attempt to subordinate and confine women. 'The offence can range from adultery to wearing lipstick. The penalty can be death'.¹¹⁶⁴

11.7 Vulnerability as refugees. Women refugees have particular vulnerability during their flight and in countries of asylum.

The perpetrators of sexual violence against refugee women in the course of their flight include bandits, smugglers, border guards, police, members of military and irregular forces on either side of the border, and even elements of local populations who take advantage of the utter defencelessness of arriving refugees. The need to cross military lines or areas affected by anarchy or civil war in order to reach safety puts women and girls in especially perilous circumstances. Border guards in some countries have detained refugee women or girls for weeks for their sexual use. Women have been raped by soldiers while crossing a border, and in some cases abducted and prostituted by them.¹¹⁶⁵

Recognition of gender issues in refugee programs

11.8 Overseas measures. Efforts have been made by the Executive Committee for the UNHCR¹¹⁶⁶ and individual States to redress the gender imbalances in international refugee protection mechanisms. The Executive Committee of the UNHCR has made recommendations¹¹⁶⁷ and drawn up Guidelines on the Protection of Refugee Women¹¹⁶⁸ (UNHCR Guidelines) and called on all states to implement these guidelines. In 1993 it made strong recommendations deploring sexual violence.¹¹⁶⁹ Canada, the Netherlands and USA are among those who have taken action to draw up their own guidelines.¹¹⁷⁰ The Swiss Federal Bureau for Male-Female Equality has produced a paper entitled *Les femmes victimes de persecution et la notion de refugie*, April 1992; and the Dutch Advisory Committee on Human Rights and Foreign Policy has also proposed draft guidelines.¹¹⁷¹

11.9 Canadian guidelines. The Canadian Immigration and Refugee Board (IRB) issued guidelines in 1993 for dealing with Women Refugee Claimants Fearing Gender-Related Persecution. They are designed to guide decision makers on the definition of refugee, the kinds of evidence required, and the problems women face in having their claims heard. In particular, they address:

- The extent to which a woman making a gender-related claim of fear of persecution can rely on any one, or a combination, of the reasons for persecution set out in the 1951 Convention definition.
- When sexual violence, or the threat thereof, constitutes persecution within the meaning of the 1951 Convention definition.

They indicate how the claims of many women asylum seekers can come under one or more of the Convention grounds of persecution. The Guidelines are reproduced in Appendix 2.

11.10 **Guidelines for decision-makers.** Australia's obligations under CEDAW require that government programs be administered in a way that will give effect to the provisions of that Convention. This in turn requires an interpretation and application of the refugee definition and an assessment procedure that do not discriminate against women. In this chapter the need for guidelines will be explored and overseas experience examined in order that effect may be given to these obligations.

. . . The examination of foreign jurisprudence by courts interpreting common terms under the 1951 Refugee Convention and 1967 Protocol should be a standard exercise, and not an occasional occurrence. . . Those responsible for the formulation of policy may also find useful the techniques and Guidelines used in other jurisdictions consistent with respecting national notions of fairness. Only through consistent examination of foreign jurisprudence and practice can standardised protective conduct be fully promoted as a goal of the international community in making refugee arrangements . . .¹¹⁷²

How Australia fulfils its obligations

Australia's two programs

11.11 Australia's refugee and humanitarian intake has two components: 'off-shore' or overseas program and 'on-shore' program. The overseas program involves the selection and admission of persons identified overseas as being in need of resettlement on refugee or humanitarian grounds. As a party to the Refugee Convention, Australia is also obliged to offer protection to persons who come to Australia seeking protection who are granted refugee status after their arrival.¹¹⁷³ At present, on-shore claimants who are recognised as refugees are granted permanent residence.¹¹⁷⁴

Selection criteria

11.12 **The off-shore program.** The off-shore intake is planned and entrants are chosen according to the selection criteria prescribed for the various sub-programs. Some may be required to meet the Refugee Convention definition of refugee but in no part of the overseas humanitarian program is this the sole criterion for selection. Other selection criteria may include the person's connections with Australia and prospects for settling successfully in the country. The concern in the present context is that the totality of the criteria used for selecting refugee and humanitarian cases overseas tends to favour the selection of men rather than women. This concern persists although there is a special category in the overseas program that offers protection to 'women at risk'.

11.13 **The on-shore program.** By way of contrast, most persons who seek protection after entry into Australia are granted protection exclusively on their ability to meet the UN definition of refugee. The Minister also has a discretion to grant residence on humanitarian grounds.¹¹⁷⁵

Appeal process

11.14 The primary decision to grant refugee status to persons in Australia is taken by an officer of the Department of Immigration and Ethnic Affairs (Determination of Refugee Status or DORS officer). A major difference between the on-shore and off-shore programs is that on-shore refugee claimants have a right of appeal against adverse decisions to the Refugee Review Tribunal. This tribunal was set up under the Migration Act. Off-shore applicants have no access to merits review and no right to obtain reasons for a decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). Overseas applicants for entry on humanitarian grounds can seek and have sought review of a refusal under the ADJR Act just like asylum-seekers within Australia. Without reasons for the refusal or someone in Australia to pursue legal action, however, the reality is that few off-shore refusals end up in the courts.

The submissions

11.15 DP 54 highlighted the need for scrutiny of the selection criteria and processing methods used for both on-shore and off-shore applicants.¹¹⁷⁶ Submissions drew the Commission's attention to deficiencies in both programs.¹¹⁷⁷ In the on-shore program there is evidence of

- gender bias in the definition of refugee, applicable to both programs but critical in the on-shore program
- gender bias in procedures for processing applications.

In the off-shore program there is evidence of

- gender bias in the criteria used to select applicants
- inadequacy of special programs for 'women at risk'.

Interpreting the definition of refugee: persecution

Requirements of the definition

11.16 All applicants for refugee status must satisfy the definition of refugee set out in the Refugee Convention.¹¹⁷⁸ An applicant must establish that she has been persecuted on the basis of one of the enumerated grounds, that she has a 'well-founded fear' of persecution in the future and that the persecution is at the hands of the government or an individual or entity that the government either cannot or will not control. Much jurisprudence, both in Australia and overseas, has been built up around this definition. It is an onerous test for any applicant to satisfy. Women who are targets of violence and women who suffer other forms of gender based persecution have particular problems in meeting its requirements.

*Amnesty International is concerned that the particular types of persecution suffered or feared by women asylum seekers may not be readily recognised as reasons for being accepted as a refugee, and Amnesty fears that in some cases women are consequently returned to their country of origin where they are at risk of arbitrary imprisonment, torture or execution.*¹¹⁷⁹

The problems occur both with the interpretation of the notion of persecution and with the grounds of persecution. While these are distinct requirements they are also inter-related. This is reflected in the following sections of this chapter.

Persecution

11.17 **No uniform interpretation of persecution.** The meaning of persecution is not defined by the Convention. One widely accepted definition is 'the sustained or systematic violation of basic human rights as a result of state action or arising from a failure of state protection'.¹¹⁸⁰ However there is no uniform interpretation. Some countries interpret and apply the term liberally; other countries interpret and apply it restrictively.¹¹⁸¹

11.18 **The public/private distinction.** Both Australian and international jurisprudence has tended to treat persecution as involving a certain relation between individual and his/her state. This is manifest in the requirement that individuals be targeted because of the public expression of their identity or ideology.¹¹⁸² Sexual violence against women tends to be seen as occurring in the private rather than the public sphere and discounted as persecution.¹¹⁸³ Women's resistance tends not to be 'organised' in a public sense and therefore not acknowledged as 'political'.¹¹⁸⁴ Discriminatory practices may also be seen as 'private' where they affect family life. In many cases, most notably in cases of sexual or domestic violence, the nexus between the individual and the state is generally more complex than in 'public' forms of persecution. Difficult issues arise as to the exact extent of state responsibility.

In representing refugee clients we find that when a woman claims that she has been raped or otherwise sexually violated, it cannot be taken for granted that this will be accepted by the Department as a form of persecution and/or inhuman and degrading treatment. In some instances the DORS officer has considered a claim of rape as irrelevant to a claim for refugee status or has given it

little weight . . .

Even where it is accepted by the DORS Officer that a woman has been raped by a member of the military or other government official, she then has to demonstrate that the person who raped her was not acting in his private capacity rather than his official capacity before it is considered relevant to her claim for refugee status.

*Thus as seen in other areas of legal practice, women's experience of persecution is characterised as 'private' and therefore not in the 'public' realm addressed by the Convention.*¹¹⁸⁵

11.19 Australian definition of persecution. In Australia the High Court discussed 'persecution' in the case of *Chan Lee Kin v The Minister for Immigration and Ethnic Affairs*.¹¹⁸⁶ Chief Justice Mason defined persecution as 'some serious punishment or penalty or some significant detriment or disadvantage' which an applicant will suffer if he or she returns to his or her country of origin.¹¹⁸⁷ Justice McHugh spoke in terms of 'selective harassment' stating:

As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason at an individual or as a member of a class she is being persecuted for the purposes of the convention.

Justice McHugh's approach can be summarised as follows:

- (a) an individual may be persecuted as an individual or as a member of a class;
- (b) a single act may be enough to constitute persecution;
- (c) the agent of persecution may be the government or any other entity against which the government has failed or is unable to protect the person;
- (d) the relevant 'harm' need not be a threat to life or liberty, other examples of persecution being:
 - (i) measures in disregard of human dignity;
 - (ii) serious violations of human rights;
 - (iii) denial of access to employment, to the professions and to education;
 - (iv) restrictions on freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement.¹¹⁸⁸

Given the very broad interpretation of the term 'persecution' in Chan's case there is no obvious reason why the UN definition of refugee could not be applied in a way that will assist the protection of women.

Sexual violence as persecution

11.20 Overseas practice. Rape and sexual harassment are regarded as by-products of war or breakdown in social order rather than as tools of persecution. The systematic rape of women in the war in Bosnia-Herzegovina has given prominence to this issue. On 23 February 1993 the UN Commission on Human Rights adopted a resolution condemning the abuse of the human rights of women in Bosnia-Herzegovina and concluded that the practice of rape and abuse in former Yugoslavia constitutes a war crime.¹¹⁸⁹ The UN General Assembly and the UNHCR have also both taken a strong stand on recognising the abuse of women as 'persecution'.

There can be no doubt that when rape or other forms of sexual violence committed for reasons of race, religion, nationality, political opinion or membership of a particular social group is condoned by the authorities, it may be considered persecution under the definition of the term 'refugee' in the 1951 Convention relating to the Status of Refugees. A well-founded fear of rape in such circumstance can thus provide the basis for a claim to refugee status.¹¹⁹⁰

In 1990 the General Assembly endorsed a recommendation of the Executive Committee of the UNHCR that

all action taken on behalf of women who are refugees must be guided by the relevant international instruments relating to the status of refugees as well as other applicable human rights instruments, in particular, for parties thereto, the United Nations Convention on the Elimination of All Forms of Discrimination against Women.¹¹⁹¹

The treatment of women who have been the targets of sexual violence has varied greatly before foreign courts and refugee tribunals. Some courts and tribunals have shown insensitivity to the matter,¹¹⁹² while others have gone to great lengths to impute political motives to those who attack women in order to bring women applicants within the ground of 'political opinion'.¹¹⁹³

11.21 **Australian practice.** Within Australia there is some recognition that sexual abuse may constitute persecution. Following the High Court decision in Chan's case sexual abuse can be considered a serious violation of human rights, either as an infringement of personal integrity or as torture. Despite this, practice in Australia has not yet consistently recognised sexual abuse as persecution even where perpetrated by government officials or with tacit government support.

*The lack of understanding by Delegates is a matter of concern and demonstrates disregard for recent international developments which recognise rape as persecution.*¹¹⁹⁴

W is a Chinese national who trained as a secondary school teacher. She wanted to join the Communist Party. At the school where she taught, she was sexually harassed by the school's Communist Party Secretary. W stayed at her job and managed to avoid the Secretary by declining to become a member of the Communist Party. This decision meant that she forfeited her opportunity to obtain certain benefits such as housing, promotions and health care. When W was overheard discussing the democracy movement with students, the deputy head of the school asked her to go to the Secretary's home to discuss her continued employment. At his house, W was raped by the Secretary. She resigned her job. She later converted to Catholicism, joined a human rights pro-democracy movement and eventually fled China. In Australia, W applied for refugee status. According to a transcript taken during her first interview, the DORS officer said to her:

*'Now, you make two claims: one is on your rape and one is on your religion. The rape question is not a Convention-related issue, therefore we will not discuss that question. We will go straight into the religion issue.'*¹¹⁹⁵

11.22 **Refugee Review Tribunal decisions.** The Refugee Review Tribunal (RRT) held in one case that rape had been part of a continuum of persecutory behaviour.¹¹⁹⁶ In another case the RRT rejected a claim for refugee status based on a Cambodian woman's claim of sexual harassment at the hands of a government official.¹¹⁹⁷ The decision-maker accepted that the woman had a genuine fear of being targeted by the official if she returned to Cambodia but held that this fear did not make her a refugee. The decision-maker considered that her persecutor was not acting as an official agent of the state and that his actions were not sanctioned or approved by the state. It was not seen as relevant that the state was unwilling or unable to stop his behaviour.¹¹⁹⁸ Whatever the merits of these cases the varying approaches in these and others highlight the problems of a lack of guidelines.

Persecution arising out of domestic violence

11.23 Domestic violence tends to be regarded as belonging to the private, rather than public, sphere. Without exception, applicants on this basis have been denied refugee status. In one recent case a Turkish woman had fled her husband who had subjected her to severe domestic violence.¹¹⁹⁹ She sought refugee status. She had evidence that her life would be in danger if she returned to Turkey as her ex-husband had repeatedly threatened to kill her. She claimed that the police were unable to help her and that on many occasions when she had sought help they had not taken action. On the last occasion she had been told that the police would act if it occurred again but she was not prepared to take the risk. The Refugee Review Tribunal accepted the truth of her evidence and expressed sympathy but found that she did not come within the Convention grounds. In another more recent case with broadly similar facts a Chinese woman was denied refugee status, even though she was at risk in her own area, because she was also required to show that there was no

effective protection for her in any other part of the country. The Tribunal raised but did not decide whether she could fall within a social group of 'battered women' for Convention purposes.¹²⁰⁰ On current case law such an argument would have been unlikely to succeed. Clearly their failure to be protected by the state once abused, rather than the fact of being 'battered' would need to be the basis for the membership of a particular social group.

State protection

11.24 These cases highlight difficulties in cases of sexual or domestic violence perpetrated by a private individual. According to general principles of refugee law in order to show that the state has failed in its obligation to protect the applicant in these circumstances the state must either have condoned the abuse or have been powerless to prevent it.¹²⁰¹ This distinction may of course have little significance in countries where the governmental structure has broken down. It also must be shown that there is no possibility of protection or safe flight within the country. Even though this may be the case it can be difficult to prove unless there is detailed country information about issues relating to women. A woman's own testimony may not be accepted as objective. A woman victim of domestic violence may face similar problems of credibility and encounter similar lack of understanding of the personal and social dynamics of domestic violence as Australian women report encountering in the legal system.

Persecution arising out of cultural practices or attitudes to women

11.25 While there are not large numbers of Australian cases concerning cultural practices or attitudes to women, approaches to the problems of persecution have varied. Indian women who have broken the cultural mores of their communities and faced persecution as a result have been accepted as refugees by the RRT in a number of cases.¹²⁰² Prevailing policies also appear sympathetic to women fleeing cultural practices that involve genital mutilation.¹²⁰³

Persecution arising out of government social policies

11.26 Women may flee persecution that arises from government social policies. One example that has arisen in Australian cases involves the one child policy in the People's Republic of China. Women can be subjected to forced abortions and sterilisation with the sanction or tacit acceptance of authorities. The government in many parts of China fails to protect women from these practices. Women who give birth to more than one child are subjected to a range of penalties.

*The Chinese Government maintains a comprehensive and highly intrusive family planning program. Individual and family decisions about bearing children are controlled by the State, with severe sanctions against those who deviate from official guidelines . . . (These) include stiff fines (often as high as a year's salary), withholding of social services, demotion, and other administrative punishments . . . Some local officials have reportedly destroyed or confiscated the private property of families with unauthorised children if fines are not paid... Physical compulsion to submit to abortions or sterilisations is not authorised, but continues to occur as officials strive to meet population targets.*¹²⁰⁴

Cases on this basis have come before the RRT on a number of occasions with varying results. An issue, as yet unresolved, is whether women of child bearing age are a particular social group. In one case a mother of a 'black' or second child was held to be a Convention refugee.¹²⁰⁵ In another case sanctions placed on parents for having a second child were held not to amount to persecution for the purposes of the Refugee Convention.¹²⁰⁶ In a third case the RRT found against a woman who had been forced to have an abortion on the basis that the one-child policy applied to all Chinese families without distinction and that the applicant did not have a high political profile.¹²⁰⁷ As the woman had already had the abortion, the Tribunal took the view that her suffering and persecution were a thing of the past.

Well-founded fear of persecution

11.27 ***Difficulty of obtaining evidence.*** The Convention definition of a refugee requires a finding that the applicant has a well-founded fear of persecution. In Chan's case the High Court found that this aspect of the definition contained both subjective and objective elements.¹²⁰⁸ This too can cause particular problems for women fleeing violence. In assessing the subjective aspect of the well-founded fear, emphasis is placed on the individual's state of mind and feelings. In many cultures women are brought up to put their own interests after their families' and accordingly find it very difficult to articulate their individual fear without linking it to their fears for close family members. They find they can only express it within the family context. A woman will talk about her fear for her children and her fear for her husband without asserting that this is in reality a fear for herself. In other instances women are reluctant to speak out about sexual violence and their fear of further violence especially in front of male family members or other men.¹²⁰⁹

11.28 ***Paucity of evidence.*** In assessing the objective element of a well-founded fear of persecution decision-makers are hindered by the paucity of research studies of the particular situation of women in their respective countries of origin. Even where a woman has been persecuted and can demonstrate a subjective fear, she may find it difficult to establish that her claims are justified from an objective point of view.

*International aid workers (in Cambodia) confirm that violence against women, including rape as well as domestic violence, is common, although there are still no systematic studies to determine the extent of the problem. Authorities normally decline to become involved in such 'private disputes'.*¹²¹⁰

Responding to the needs of refugee women

Australian guidelines

11.29 In the absence of helpful case law, in view of the inconsistency in decisions, and particularly in view of the difficulties of fitting the experiences of women refugees within the scope of the Convention, decision-makers need to be made aware of and be given assistance in these cases. Guidelines can also assist with the selection of applicants in the off-shore program. Within Australia, the right of on-shore applicants to appeal to the RRT and the requirement that the Tribunal publish its decisions enable some assessment of the way the legal definition of refugee is interpreted. Those applying abroad for entry as refugees, however, have no appeal mechanism. It is impossible to assess how the law is being applied to off-shore applicants. Guidelines can fill this void by providing a clear expression of Australian interpretation of the Convention. This will assist applicants to know the case they will be expected to present. The Commission considers it is necessary for guidelines to be drawn up to direct and guide decision-makers. The guidelines should draw on overseas jurisprudence and practice.

Persecution under the Convention

11.30 ***Options for reform.*** The inclusion of 'gender' as a ground in the Refugee Convention or as a ground in the Migration Act¹²¹¹ would be a clear and appropriate response to the actual experience of many women who suffer and flee from persecution. It is most unlikely, however, that the international community would agree to amend the Convention in this way, particularly in a climate where the tendency is to restrict rather than expand the scope of the Convention. Nonetheless the Australian Government should propose this amendment where appropriate in international forums. In the absence of this reform it is apparent that guidelines are needed to assist decision-makers.

11.31 ***States' obligation to protect.*** It needs to be spelled out in guidelines that sexual abuse, sexual harassment and domestic violence are capable of being manifestations of persecution under the Convention in circumstances in which there can be shown to be a failure of state protection.¹²¹² States are obliged to ensure the proper administration of justice and effective remedies for violations of human rights,¹²¹³ including the protection of the individual against rape and other forms of sexual violence whether or not it is by an official in a public capacity. Military targeting of women for sexual abuse is a war crime which the state should punish.¹²¹⁴ If the state fails to act then it becomes an agent of persecution.¹²¹⁵ Although these principles are within the scope of Chan's case they should be articulated in guidelines. If, however, the

perpetrator is not directly related to the government the issue is whether the state is unable or unwilling to protect the woman. Issues to consider in this context include:

- whether the woman sought and was denied protection by the government
- whether governing institutions and/or governmental agents were aware of the harm to the woman and did nothing to protect her
- whether the woman has other reasons to believe that it would be futile to seek the protection of the government, for example, if the government has denied protection to similarly situated women or if the government has systematically failed to apply existing laws.¹²¹⁶

The fact that violence, including domestic violence, is widespread should not detract from a woman's claim for refugee status. Systematic failure of the state to meet these obligations can amount to persecution under the Convention. These issues should be addressed in guidelines for decision makers.

11.32 ***A regional failure to protect.*** A claim for refugee status cannot arise where protection is available in another part of the home state. Applicants in some Australian cases have failed on this ground.¹²¹⁷ Guidelines proposed by the Harvard Immigration Project state

An asylum applicant does not have to establish that the persecution she fears exists nationwide if, under all the circumstances, it would have been unreasonable for her to seek refuge in another part of the country. In considering whether such an internal flight alternative is reasonable, the adjudicator should consider the ability of the persecutor to act nationwide, whether the woman could genuinely access protection in another part of her country and whether the protection would have been meaningful. Relevant factors to consider are financial, logistical and other barriers that may prevent the woman from reaching internal safety and whether the quality of internal protection meets basic norms of civil, political and socio-economic rights.

11.33 ***Gender-based persecution.*** A particular law or action is clearly not persecutory merely because it discriminates against women. The Harvard Immigration Project guidelines raise two issues for decision makers in relation to gender-based law.

- The law must be targeted at women, either as written or in its application. A law may be written explicitly to impose restrictions only on women, or it may be gender-neutral on its face but applied in a manner with targets women.
- The harm feared as a result of the imposition of the law must be of a serious nature. The harm feared may be the imposition of the law in and of itself or it may be the punishment imposed for violation of the law.¹²¹⁸

The Canadian guidelines have similar provisions.¹²¹⁹ These policies should be spelled out in guidelines for the assistance of decision-makers.

Recommendation 11.1

Guidelines should be drafted for refugee decision-makers on the appropriate treatment of cases involving:

- **persecution of women by assault, sexual torture or sexual harassment arising from military or government officials or from private citizens**
- **persecution arising out of cultural practices or attitudes to women**
- **gender-based persecution arising out of social policies set by government**
- **other instances of gender-based persecution**

- **the application of principles of state protection to these kinds of persecution.**

Importance of country information

11.34 **Information on the status of women.** In assessing a woman's susceptibility to persecution it is essential to consider the status and experiences of women in the country from which she has fled. This should include information about the legal position of women, their civil, political, social and economic rights, the incidence of reported violence against women, the forms of violence, the protection available to women facing such violence and the consequences for a woman of returning to her country in light of the circumstances described in her claim.¹²²⁰ The Executive Committee of UNHCR affirmed this in its conclusions in 1985.¹²²¹ A set of proposed Dutch guidelines set out questions to be asked where sexual violence plays a role in the persecution.

- Can it be said that the authorities and/or the community provided protection? Concerning the community, were there institutions or people who were able to appropriately help? Concerning the authorities, has a complaint been made to the appropriate authority? Was it possible, legally and especially practically, to make the complaint? Did this involve any risks and if so, what? These questions are meant to allow an insight into how the legal system functions within the political order of a country.
- What are the (possible) consequences of having experienced sexual violence for the refugee woman? In some cultures, the woman does not only lose her self-respect, she also puts her whole family to shame. The consequences may be that a woman is not only disowned by her husband, but also by her whole family. Furthermore, for young women who are not married, it means no men will be willing to marry them. The fact that women are often the victims in situations where human rights are violated or of violence used as a result of political repression does not diminish the consequences.
- What fear of persecution waits a woman when she is forced to return to her country? Does she again have to fear persecution by her community or the government? Is she (again) at risk of being sexually abused? Does she expect to be threatened with sexual abuse? Will it be possible for her to return to her country and lead a normal life? Will she be accepted by the community?¹²²²

11.35 **Commission's view.** The Commission considers that detailed information on the position of women is of paramount importance in assessing their claims, particularly where sexual violence or domestic violence is part of their case. The Department of Immigration and Ethnic Affairs should be responsible for ensuring that the relevant information is before a decision-maker dealing with a refugee application from a woman in those circumstances.

Recommendation 11.2

The Department of Immigration and Ethnic Affairs should do all it can to ensure that its research into country conditions includes information on the political, civil, social and economic status of women, the incidence of reported sexual and domestic violence against women, the protection available to women who are the targets of violence and social attitudes affecting women.

Interpreting the definition of refugee: Convention grounds

Introduction

11.36 An applicant for refugee status must show that the persecution they suffered is on one of the enumerated grounds in the definition of refugee. The major difficulty faced by survivors of sexual violence that takes place in prison camps, by officials, the military or paramilitary forces, is the difficulty in establishing that the rape is linked to the social, political or religious position. In short they must show that

the sexual violence is a form of conduct regularly used in opposition to that particular group. This requires detailed information about the social, political and legal condition of women in that country.

Absence of gender from grounds of Convention

11.37 The grounds of persecution in the Convention do not include gender. Women who suffer state-condoned persecution in specific situations because of their gender have to establish that this is on the ground of religion, political opinion or membership of a social group. Neither the situation nor the gender is a ground. Both political opinion and 'membership of a particular social group' need to be broadly interpreted to encompass gender based persecution but they have been narrowly construed in practice.

Political opinion

11.38 The interpretation of persecution on ground of political opinion exemplifies the problem of a definition based on male experience. The application form asks an applicant who is claiming persecution based on political opinion to provide details of political party membership and activities.¹²²³ It asks whether the applicant made speeches or wrote publications.

*The political activities that women are often involved in are, in many instances, not as 'public' as making speeches, attending demonstrations and writing publications. Women may provide food, clothing, medical care, hide people, pass messages from one political activist to another and so on. All of these activities may be essential for the ongoing existence of the political organisation, and the knowledge women gain through these activities puts them in danger and at risk. However, these activities are viewed as not having sufficient public profile to attract attention from the authorities to put them at risk.*¹²²⁴

In most cultures, the public expression of opinions about political life is to a large extent the preserve of men. Women tend to be involved in supportive roles but not to participate directly in political activities. They are persecuted because they have family associations with persons whose political opinions have led to persecution, rather than because of their personal opinions, which may not even have been expressed. It is very difficult for them to prove persecution on grounds of political opinion in these circumstances.

Women from certain cultures where men do not share the details of their political, military or even social activities with their spouses, daughters or mothers may find themselves in a difficult situation when questioned about the experiences of their male relatives.¹²²⁵

This can present difficulties in the refugee determination process, even though mere association with political activists can render a woman vulnerable to persecution.¹²²⁶

*An elderly East Timorese woman in Australia claimed refugee status based on her political opinions and activities connected to her membership and support of Fretelin in East Timor. During interview the woman was asked to name Fretelin leaders as a way of assessing her political commitment and credibility. The questions were culturally insensitive because in East Timorese culture and within the Fretelin movement itself, it is highly unlikely that women would attend Fretelin meetings as they would not view this as appropriate in their roles as Fretelin supporters. As Fretelin supporters women are expected to provide support at a very practical level: food, medicine, clothing, hiding people as well as looking after the children and running a household.*¹²²⁷

Another aspect of the gender bias in this ground is that the involvement in political life may be expressed in ways that are not traditionally considered as 'political opinion'.¹²²⁸

A broader view of 'political' opinion

11.39 The term 'political opinion' could be understood to cover a woman's opinion about the status of women within her country or cultural or religious group and her cultural or religious beliefs at variance with those

espoused and enforced by the governing political order. So for instance women who challenge the religious or cultural rules that restrict their social roles and who suffer harsh penalties for that could have suffered persecution on grounds of political opinion.¹²²⁹ The tendency instead is to treat the family as the social group and not acknowledge those women's roles as political. Canada's refugee guidelines provide a broader approach to the application of the ground of 'political opinion' to women.

(1) In a society where women are 'resigned' a subordinate status and the authority exercised by men over women results in a general oppression of women, their political protest and activism do not always manifest themselves in the same way as those of men.

(2) The political nature of oppression of women in the context of religious laws and ritualization should be recognised. Where tenets of the governing religion in a given country require certain kinds of behaviour exclusively from women, contrary behaviour may be perceived by the authorities as evidence of an unacceptable political opinion that threatens the basic structure from which their political power flows.¹²³⁰

Recommendation 11.3

Guidelines for refugee decision-makers should incorporate an approach to the ground of 'political opinion' under the Refugee Convention that encompasses the political activities of women.

Women as 'members of a particular social group'

11.40 **The interpretation of 'social group' in Australia.** The major problem of the definition of refugee for women is the interpretation of a particular social group. In *Morato v Minister for Immigration, Local Government and Ethnic Affairs*, the Federal Court held that the phrase 'social group' denotes 'a recognisable or cognisable group within a society that shares some interest or experience in common.'¹²³¹ After reviewing some examples of overseas practice, Lockhart J stated 'I do not think it wise, necessary or desirable to further define the expression'.¹²³² Persecution must then be feared *because* of membership of that group. In *Lek Kim Sroun v Minister for Immigration, Local Government and Ethnic Affairs* the Federal Court held that 'young single women' was too broad a category to constitute a social group under the Federal Court decision in *Morato* and that 'women whose husbands had anti-government affiliations' also did not constitute a social group.¹²³³ In another decision 'women subject to dowry arrangements' were held to be a particular social group.¹²³⁴

11.41 **Problems for women.** This interpretation raises difficulties for women claiming refugee status since in many cases their grouping is defined by their experience. The shared experience of women who have suffered violence is not enough to make them a 'social group' unless the fact of their violation will, in the future, make them a target of persecution. Another problem is that the suffering of the women applicants for refugee status is often indistinguishable from the suffering experienced by the general population of women. In many receiving countries, the chances of obtaining asylum seem to reduce in inverse proportion to the size of the social group identified.¹²³⁵ These problems are well illustrated by the findings of the RRT in the Cambodian case discussed earlier.¹²³⁶ In concluding her remarks, the tribunal member wrote:

A social group cannot be defined by the harm feared. Rather, it is defined by common social characteristics which might attract persecution, and consists of individuals who are at risk of persecution because of those characteristics . . . The Applicant's legal representatives submit that the Applicant is part of a social group constituted by 'women without protection from sexual assault'. The members of this group are defined by the nature of the persecution or harm feared, rather than common social characteristics which bind them together and put them at risk of persecution...The harm (the Applicant) fears of non-discriminatory generalised crime even though she is able to identify the person whom she fears. It is directed not only at her and her family but also others in the community. The fact that adequate mechanisms are not in place to control criminal and corrupt behaviour is a problem that faces citizens of Cambodia in general.¹²³⁷

Extending the interpretation of social groups

11.42 **The usefulness of a social group.** While the content of 'social group' is unclear and its relevance often disputed, the ground of social group is nevertheless of undoubted usefulness to accommodating applications by women.¹²³⁸ It is said to have been intended as a safety net and that, as such, it could cover gender as a

ground of persecution.¹²³⁹ Precisely because of its flexibility it can cover situations which do not fall within the scope of any of the other grounds. Gender-based groups are clear examples of social subsets defined by an innate and immutable characteristic and thus properly within the social group category.¹²⁴⁰ Recognition of women as a social group may entitle women with valid claims of persecution to the same protection afforded to individuals persecuted for other prohibited reasons.¹²⁴¹ The Dutch Refugee Council issued the following policy directive in 1984:

It is the opinion of the Dutch Refugee Council that persecution for reasons of membership of a particular social group may also be taken to include persecution because of social position on the basis of sex. This may be especially true in situations where discrimination against women in society, contrary to the rulings of international law, has been institutionalized and where women who oppose this discrimination, or distance themselves from it, are faced with drastic sanctions, either from the authorities themselves, or from their social environment, where the authorities are unwilling or unable to offer protection.¹²⁴²

The UNHCR Guidelines make a similar point.¹²⁴³ Logically there is no reason why in these circumstances women should not be a particular social group. Governments may fear however that if the concept of social group is given too wide an interpretation there could be a substantial extension of refugee status with consequences throughout refugee law. However, considerations of numbers of possible refugees do not preclude refugee status being given under any other heading in the definition and should be seen as irrelevant.¹²⁴⁴

11.43 ***Family as a particular social group.*** Both Canadian¹²⁴⁵ and American¹²⁴⁶ case law have recognised that the family may constitute a social group. There do not appear to be Australian cases that would prevent such an interpretation. This would particularly assist women who attract persecution because they are identified with the political opinions of other family members whose views they may not share.¹²⁴⁷

11.44 ***Women who face harsh and inhuman treatment as a particular social group.*** The European Parliament has urged that 'women who face harsh and inhuman treatment because they are considered to have transgressed the social mores of their society' be considered a particular social group.¹²⁴⁸ An extension of the social group category could make up to some extent for the absence of gender as a specified ground in some circumstances.¹²⁴⁹ The Executive Committee of the UNHCR in 1985

recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.¹²⁵⁰

11.45 ***Canadian practice.*** Women as members of a 'social group' were discussed in a number of Canadian cases in the late 1980s.¹²⁵¹ These culminated in *Re C (QK)*, where the Immigration and Refugee Board (IRB) acknowledged that women persecuted because of their failure to conform with the norms of their community were 'members of a particular social group'.

It is clear . . . that women in Iran face threats to life and freedom at the hands of the regime . . . I determine [the applicants] to be Convention refugees by reason of their well-founded fear of persecution for reasons of religion, political opinion and membership in a particular social group [women and girls who do not conform to Islamic fundamentalist norms] should they return to Iran.¹²⁵²

The Canadian IRB Guidelines now support use of the social group category as a basis for a gender-related fear of persecution which is not otherwise covered by the 1951 Convention. According to the guidelines, a woman fearing persecution because of her membership of a particular gender-defined social group must be able to demonstrate that the group suffers or fears to suffer severe discrimination or harsh and inhuman treatment that is distinguished from the rest of the population and from other women. The fact that the particular social group may consist of large numbers of the women is, taken in itself, irrelevant.

a sub-group of women can be identified by reference to the fact of their exposure or vulnerability for physical, cultural or other reasons, to violence, including domestic violence, in an environment that denies them protection. These women face violence amounting to persecution, because of their particular vulnerability as women in their societies and because they are so unprotected.¹²⁵³

Recommendation 11.4

Guidelines for refugee decision-makers should incorporate an approach to 'membership of a social group' under the Refugee Convention that permits the group to be defined by reference to an experience of severe discrimination or harsh or inhuman treatment that is distinguished from the rest of the population and from other women.

A sub-group of women can be identified by reference to their vulnerability for physical, cultural or other reasons to violence, including domestic violence, in an environment that denies them protection.

11.46 *Status of the Canadian guidelines.* The Canadian guidelines were drawn up by the Chairperson of the Canadian Immigration and Refugee Board, under powers given by statute. The Guidelines are not binding on members of the board nor on the courts but they encourage a uniform approach to cases by providing a series of directions.

11.47 *Preparing guidelines.* Under the Migration Act the Minister has the power to issue general policy directions which must be laid before Parliament.¹²⁵⁴ The Presiding Member of the RRT has the power under the Migration Act to make guidelines but only for the allocation of work among Tribunal members. There needs to be a broader power to issue guidelines for those making decisions on refugee application to deal with the application of the definition and with other matters of collecting and assessing evidence. One option would be for the powers of the Presiding Member to be extended to enable him or her to draft these guidelines. There would be advantages in utilising the expertise and facilities of the RRT in this way. Another option is for an independent body to be set up to draw up the guidelines. Membership of the body could include the Presiding Member of the RRT, the UNHCR and representatives from key non-Government organisations such as the Refugee Council of Australia, ANCCORW, the National Advisory Council for Women and the Refugee Rights Centre. The Commission considers that the second option is preferable because it will give access to a wider body of expert opinion and community views.

11.48 *Implementing the guidelines.* The guidelines should be included in Migration Regulations. They would therefore be required to be submitted to the Minister and the Government and laid before Parliament.

Recommendation 11.5

The guidelines on women refugees should be drafted by an independent body of experts and should be included in the Migration Regulations.

The on-shore determination process

The identification of women's claims for protection

11.49 In most refugee claims involving families the husband is the principal applicant and the woman is a dependent. If his claim is accepted hers is as well, but if his is rejected hers will also fail. Often the woman is not interviewed separately either because of her husband's resistance or because separate interviews are not automatically conducted by the Department.¹²⁵⁵

A family comprising an adult male (M), an adult female (F) and two children came to Australia and sought protection as refugees. With legal assistance, an application for refugee status was lodged with M as the principal applicant and F and the children as dependants. F submitted a short statement in support of her husband's claims. The family were kept in detention, but were moved several times. Each time they were moved they were given a different legal representative.

During the assessment process, M was interviewed by a DORS officer but F was not consulted. After more than two years in detention, the application was rejected. F became extremely depressed and

attempted suicide. The attempt was viewed as a 'health' problem and she was referred to health professionals for treatment. After F told her story to a psychologist with the support and assistance of a bi-cultural counsellor, it became clear that F could and should have made an application for refugee status in her own right.

*After nearly four years in detention, F submitted a separate application for refugee status on the basis of her experiences. The reasons given by her for remaining silent were that she had not told her husband of her experiences, and did not want him to know about them. As a result of what she had endured, she had already experienced total ostracization, harassment, shame and blame from her family and community at home who had branded her a whore. It was only when she was made to understand that telling her story would improve her chances of remaining in Australia that she began to divulge the details of what had happened to her.*¹²⁵⁶

The Legal Aid Commission NSW asserts that the problems for women begin with the application form used for the lodgement of claims.¹²⁵⁷

It is designed in such a way that there is always a 'principal applicant'. Anyone else included in the application is a 'dependant'. In cases where a family or a married couple are applying for refugee status, it has been the experience of the Commission that for cultural and other reasons, the man almost always makes his claims as the principal applicant.

Although the questions ask about 'you or any other member of your family', in fact the emphasis tends to be on what happened to 'you' being the principal applicant.

The dependent spouse's claims tend to be treated as secondary or merely supportive of the primary applicant's claims. It follows from this that the spouse's claims may not be elaborated in any detail and the spouse may not even be interviewed. Her claim to refugee status is never properly assessed.

If, after the application has been lodged, the marriage breaks down during the extremely stressful ..processing period . . . the woman will lose her 'dependent' status and will have to lodge a fresh application . . . (putting her back) to the end of the queue.

Interviews

11.50 **Sensitivity in interviewing.** Where women are interviewed there is anecdotal evidence that some officers can be insensitive in the methods used to gather information on sexual or other abuse. This may mean that this evidence is not forthcoming until very late in the determination process. This in turn can lead to the woman's credibility becoming an issue.¹²⁵⁸ Although the Department of Immigration and Ethnic Affairs does its best to ensure that women are interviewed by women, it is not necessarily the case that a woman appearing before the RRT in a case of sexual abuse will appear before a woman member of the Tribunal. While it cannot be assumed that women are necessarily more sensitive than men to the issue of sexual or domestic violence, this practice underestimates the strength of cultural prohibitions on discussing sexual matters with a man. A woman's reluctance to speak about these matters can also be interpreted as a lack of credibility.

11.51 **Overseas guidelines for interviews.** In the US 9th Circuit Report on Gender Bias, credibility was found to be a major issue in refugee determinations, particularly because the applicant's own testimony can be sufficient to support her or his claims. Interviews with applicants are important in obtaining information and establishing credibility.¹²⁵⁹ The Report recommended consideration of the Canadian guidelines on interviewing.¹²⁶⁰ The Harvard Immigration and Refugee Project, the Dutch Refugee Council and UNHCR have also recommended guidelines for the interviewing process. They include the use of female interviewers and female interpreters, the use of indirect questions to obtain indications about gender-related persecution and an awareness of gender differences in communication.¹²⁶¹

11.52 **Guidelines.** Clear guidelines are required to regulate the handling of claims made by women refugee applicants to assist both decision-makers and others involved in the determination process. The issues of separate applications and separate interviews for women need to be addressed.

Recommendation 11.6

Guidelines for the handling of claims by women asylum seekers should be drafted to assist decision-makers and others involved in the refugee determination process. These guidelines should address application forms, separate interviews and methods of interviewing.

11.53 **Training interviewers.** Where women are interviewed it is important that officers are aware of the issues that may arise and are trained to deal with them. Training is a normal part of the professional preparation of DORS officers and RRT members. However, interviewers, who are often decision-makers need training in the nature of domestic violence, sexual assault and sexual torture of women. This is also called for in the UNHCR Guidelines and the Canadian guidelines.

Recognise that women who have been sexually assaulted exhibit a pattern of symptoms that are described as Rape Trauma Syndrome. These symptoms include persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss or distortion. These symptoms will influence how a woman applicant responds during the interview. If misunderstood, they may be seen wrongly as discrediting her testimony.¹²⁶²

In the Commission's view the appropriate training of staff is essential.

Recommendation 11.7

Gender awareness training should be required for all interviewers, and decision-makers in refugee matters. Issues of sexual violence and domestic violence should be included as part of this training.

Women refugee claimants and detention

11.54 **Detention required by law.** Another area of concern in the treatment of women in the refugee determination process relates to the issue of detention. Since May 1992, border claimants for refugee status have been termed 'designated persons'. What started as policies that had required the detention of these people until they either left Australia or were given an entry permit, became law.¹²⁶³ The laws affecting these people make no exception for women (or children) who have been victims of violence. Neither has much attention been given to the treatment of those women in detention.

I will always remember one Cambodian woman. She studied English hard and became fluent enough to act as an interpreter for others held in the Centre. She helped another woman who was going through problems of depression and who had attempted suicide. But, as the months went by, she began to lose interest in studying, and became less and less social. Her eyes became more distant, and she would no longer visit me in the office to talk, nor would she agree to interpret for anyone else.

One day in August 1992, after more than a year of detention in Sydney, and two of waiting, we found her catatonic in her room. She would stare in front for hours, refusing to talk to anyone. She went on a hunger strike which lasted over 3 weeks. Eventually, she was joined by two other women. The three of them went in and out of hospital, as a result of a series of hunger strikes that lasted on and off until the end of 1992. This was a terrifying period for all of us at Villawood. We were so worried about the women because they became so sick and there was nothing that we could do when final decisions had not been made on the women's cases.

When the women became desperately ill, the government tried to solve the problem by ordering the doctors to force-feed their patients. The migration regulations were changed to allow the women to be

force-fed. The hospital where they were staying was declared a detention centre. The doctors were furious and made complaints to the Minister.

Over this period, the first hunger striker refused to talk to anyone, and would only communicate by writing. She wrote long and very eloquent letters expressing what she was feeling.

Eventually, this woman abandoned her hunger strike, because it was clear that no-one was going to let her die like that. Then, when she started to get her strength back, she tried other ways to commit suicide. Then she started to get seriously ill mentally. She started hearing voices, and began to think that everyone was spying on her. The psychologist's report said that she was suffering from reactive depression, due to the uncertainty of her situation in Australia. Nonetheless, she was transferred to a hospital for the mentally insane and kept in a locked ward.

This woman had horrific stories of her time in Cambodia, but she was never recognised as a refugee. The Department accepted that she had a terrible history, but insisted that changes in Cambodia meant that it was safe for her to return there. I understand that she has left Australia now, to go to Austria as the bride of a Cambodian man she knew in her youth. I saw her before she left. She was walking around, and recognized me. She was talking a little, but she's not the same person. I don't know if she's still on heavy medication, or whether she's just 'lost it'.¹²⁶⁴

11.55 *Joint Standing Committee Report.* In March 1994 the Joint Standing Committee on Migration reported on detention practices affecting asylum seekers.¹²⁶⁵ It recommended the continuation of the policy of mandatory detention, with some exceptions for people detained over six months. Where asylum seekers have been in detention for this length of time and their continued waiting is caused by administrative inaction or error, the committee recommends that there be a non-compellable discretion in the Minister to consider release if certain criteria are met. These include matters such as the unlikelihood that the person will abscond and the strength of the claim. Asylum seekers who seek judicial review of adverse decisions are considered to be abusing the system by failing to accept the decision of the original decision-maker and the administrative reviewer. The committee also recommended that asylum seekers be required to obtain leave to apply for judicial review in the Federal Court. It suggested that, if this does not reduce the number of applications being made, consideration be given to denying all access to the Federal Court so that redress would be available only in the High Court.¹²⁶⁶ These recommendations are of particular concern to women refugee applicants, who already face great difficulties. If the primary decision-makers and the administrative review bodies take a consistently conservative approach to women's issues, judicial review in the Federal Court may be the only avenue for relief. Forcing applicants to go to the High Court instead puts in their way another barrier to justice which may fall more harshly on women.

Recommendation 11.8

The right of asylum seekers to seek review of adverse decisions in the Federal Court should be retained.

11.56 *Children.* In the Joint Standing Committee's report, some attention is given to the plight of children in detention and the extent to which the current policy offends Australia's international legal obligations. In recognition of the urgency of this issue, regulations were made allowing for the possible release of 'young boat people'. Although these regulations speak of release where this is in the best interests of the child, a similar concession is not made for the mothers of the children involved. To speak in terms of the child's best interests in a situation that would require isolation from its mother in this fashion seems paradoxical. The effect of separation on the woman involved is also not addressed.

Recommendation 11.9

The provisions for release of 'young boat people' should be extended to permit the release of

families with a young child where it is in the best interests of the child.

Acceptance on humanitarian grounds

11.57 Where on-shore asylum seekers are denied refugee status, there remains one avenue through which to seek relief. Under s 115 of the *Migration Act* 1958, the Minister has a non-compellable discretion to grant a permit on humanitarian grounds. The Minister has issued guidelines indicating the circumstances in which protection may be granted on humanitarian grounds. Like the definition of refugee, these guidelines are not gender-specific. However, since amendments to these guidelines in May 1994, they are more capable of benefiting women victims of violence. In particular, they provide for asylum to be given to a victim of torture or trauma even if she is unable to prove that she has a well founded fear of persecution on her return to her place of origin. They also provide for persons facing persecution for non-Convention reasons. There is, however, a shortcoming in the process. It appears that the applicant must go through the entire refugee appeal process and fail, before she can be considered for humanitarian consideration. Given the trauma that the applicant has probably already faced it appears an unnecessary ordeal to require that process to be exhausted. It would be preferable if she could be extracted from the process at an earlier stage if the case was an exceptional one and unlikely to succeed on refugee grounds. The Refugee Review Tribunal has no jurisdiction over cases on humanitarian grounds but could be given the power to refer the case to the Minister.

Recommendation 11.10

Early consideration should be given to whether the applicant might succeed on humanitarian grounds. The Refugee Review Tribunal should be given power on rejecting a refugee application to make a recommendation to the Minister on humanitarian grounds.

Overseas selection of refugees for resettlement in Australia: the off-shore program

Off-shore programs

11.58 **Overview.** In 1993-94, 13 000 of the 76 000 places in Australia's total immigration program were allocated for refugee and humanitarian cases. This component of the migrant intake is divided into three principal categories for off-shore applicants. The refugee category is targeted at persons suffering persecution in their home country and includes in-country special humanitarian program cases, women at risk and emergency response classes. The global special humanitarian category is designed to allow Australia to react humanely to persons who are outside their home countries as a result of war, civil strife or discrimination resulting in a gross violation of human rights. The emergency response category which was introduced in 1991-92 covers the programs set up to allow the migration of specific groups of people from countries experiencing serious unrest. Each category contains a number of classes of visa.¹²⁶⁷ The entry criteria for all the classes but one are expressed in gender-neutral terms.¹²⁶⁸ Submissions to the Commission¹²⁶⁹ suggested that the criteria used for the selection of refugee and humanitarian immigrants are not as gender-neutral as they appear on the face of the legislation¹²⁷⁰ and the material issued to overseas decision-makers.¹²⁷¹

11.59 **Criteria.** Each class of visa in the humanitarian categories requires the fulfilment of different eligibility criteria. However, they all share some common characteristics. Many of the classes require applicants to show that they are subject to either 'persecution' or 'gross violations of human rights'. Virtually all the classes require applicants to show a connection with Australia through some form of nomination and, more importantly, an ability to settle in Australia without imposing too great a burden on the Australian community. To gauge the operation of these criteria, it is useful to take as an example the regulations governing entry under one of the standard refugee/humanitarian visas, the Class 200 Refugee.

Class 200 refugees

11.60 ***Convention definition of persecution.*** Under the Migration Regulations, persons applying as Class 200 refugees must show that they are outside their home country and that they would be subject to continuing 'persecution' in their home country.¹²⁷² While the regulations do not refer to the Refugee Convention, the Procedures Advice Manual II (PAM) indicates that the test to be applied is that of persecution as defined in the Refugee Convention.¹²⁷³ The determination that the applicant meets the Convention definition must be made by the interviewing officer. The fact that the person has been accorded refugee status by another country or by the UNHCR is not sufficient.

11.61 ***Concerns.*** There are two issues of concern about the guidelines in the manual. First, the manual's reliance on the Convention definition of persecution is questionable. That definition is severely limited in its coverage of women because of the grounds on which persecution must have occurred.¹²⁷⁴ Under the *Migration Act* 1958, the only criteria that can be taken into account in making decisions are those set out in that Act and in the *Migration (1993) Regulations*. They simply require the person to have suffered persecution or substantial discrimination. It would be open to decision-makers to include gender as a ground of persecution. If decision-makers overseas are limiting their interpretation of the term 'persecution' to the Refugee Convention definition, they would appear to be making unlawful decisions. Second, the interpretation of 'persecution' in the manual and the examples given¹²⁷⁵ are oriented toward activities more likely to be engaged in by men¹²⁷⁶ and unhelpfully vague in areas of significance to women claimants.¹²⁷⁷

11.62 ***A broader definition.*** The definition of persecution in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* is extremely broad.¹²⁷⁸ There would appear to be no impediment under that definition to allowing as persecution conduct that specifically affects women. Free of the constraints of the grounds specified in the Refugee Convention a decision-maker could identify women suffering from any manner of persecution as eligible for a Class 200 Refugee permit.

Recommendation 11.11

The term 'persecution' should be explained in the PAM II in a manner consistent with the wording of the Migration (1993) Regulations. The PAM should draw the attention of decision-makers to the breadth of meaning attaching to the term at law and should attempt to address issues of specific concern to women.

Settlement prospects

11.63 ***Priority for admission.*** Women applicants for refugee status encounter difficulties beyond the test of persecution. Selection is not made only on the basis of the hardship or persecution facing applicants. Australia's admission criteria are weighted with factors that may work against the selection of those in greatest need by giving priority to persons who it is thought will settle easily into the Australian community. The ability of refugee applicants to settle in Australia has always been regarded as a relevant factor in the selection process overseas. For example, for Class 200 Refugee applicants, decision-makers are required to have regard to 'the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia'.¹²⁷⁹ Under the generic guidelines for selecting Group 1.3 (Refugee and Humanitarian) entrants, the PAM allocates priorities to applicants according to their links with Australia. People with no relatives in the country and no present or past connections with Australia are termed 'priority three' applicants. These people must be assessed as having the potential to settle in Australia if they have a nomination showing support by an ethnic, religious or voluntary group and

Possession of skills or other employment attributes, eg English language ability which would facilitate settlement in Australia.¹²⁸⁰

11.64 ***Impediments to women.*** Submissions to the Commission described the criteria used to judge whether migrants will settle well in Australia as the greatest impediments to women seeking entry on refugee and humanitarian grounds.¹²⁸¹ Although there is no actual score given for settlement prospects, and referred to the settlement test as the *de facto* 'points test for refugees'.¹²⁸² All commented on the negative impact of this

part of the selection process on women with a history of persecution. It was said that women who have suffered persecution are less likely to have had educational and employment-related opportunities than their male counterparts. They are less likely to have a trade or to speak English or any second language. Those with children are inevitably regarded as greater potential burdens on services within the community. Little credit appears to be given for the long term benefits of a stable family group or for the relative ease with which children adapt to new circumstances.

The female applicant in this case was awarded one mark under the heading of adaptability. The reason given was 'doubtful if spouse would make much effort to adapt, and would remain in the ethnic community'. It is said (by the applicant's counsel) that the inevitable inference is that the low mark for adaptability was given because the lady was Chinese.¹²⁸³

11.65 **Difficulty of challenge.** It is very hard for women to challenge refusals based on an applicant's poor settlement prospects. There is no system of administrative appeals in the refugee and humanitarian classes. Judicial review of a refusal by an Australian Court is the preserve of the very few who have wealthy connections in Australia.¹²⁸⁴ Where cases have come before the courts, the judiciary have upheld the government's right to screen out people who would prove a burden to the community.¹²⁸⁵ Although this right cannot be questioned, consideration must also be given to the issue of gender balance within the overseas humanitarian program as another facet of the public interest.

Recommendation 11.12

The Department of Immigration and Ethnic Affairs should investigate and redress the gender imbalance in its offshore refugee/ humanitarian program by issuing guidelines that

- **allow a more flexible assessment of the attributes of women applicants and**
- **give credit for the practical skills, general capabilities and the positive attributes of stable family groups.**

Women at risk

The category

11.66 The 'Women at Risk' category was introduced into the off-shore refugee and humanitarian program in 1989 primarily to assist women in refugee camps overseas who were being brutalised by sexual violence. It does not apply to on-shore applicants. It began as a modest component of the program but has recently been almost doubled in size.¹²⁸⁶ Even so, it is less than 1% of the total program. Women at Risk applicants must be female and must show that they are victims of persecution who are registered as being of concern to the UNHCR'.¹²⁸⁷ In addition, an applicant must show that

- she is without the protection of a male relative and is in danger of victimisation, harassment or serious abuse because of her sex and
- settlement in Australia is in her best interests and would not be contrary to the interests of Australia.¹²⁸⁸

The problems

11.67 The establishment of the Women at Risk category is commendable. The Australian National Consultative Committee on Refugee Women (ANCCORW) noted as early as 1991, however, that there are deficiencies with the scheme. The number of places allocated each year has been very small. A number of shortcomings in both the screening process and the criteria for approval have been identified. These include:

- the failure to publicise and general lack of information about the program

- limiting cases to those identified and registered by the UNHCR
- the requirement that women be without the protection of a male relative.

Although the requirement is that a woman be without the protection of a male relative who is willing or capable to protect her the Commission was told of cases in which the requirement had appeared unjust. In the view of the Commission the present requirement as currently worded is inappropriate. At most, there should be a non-sexist general rule requiring a lack of adequate family support. The rule should be flexible enough to recognise exceptional cases where, despite apparent protection, the woman is at risk.

Recommendation 11.13

The current eligibility requirement in the women at risk program, of lack of protection of a male relative should be replaced by a requirement of lack of adequate family support. In cases of doubt or particular need this requirement should be waived.

Recent improvements

11.68 There have been some improvements to the criteria attaching to 'women at risk' since 1991. For example, the program is no longer tied to women identified as refugees. It is now sufficient that applicants 'be of concern' to the UNHCR.¹²⁸⁹ According to the Department, arrangements have been made to prepare a newsletter and leaflet for circulation to overseas posts, UNHCR field officers and other relevant people. The number of places allocated for this category was increased in 1993-94 to 400. All posts with refugee caseloads have been asked to ensure that 10 per cent of their visa issues target these cases in 1993-94. Current expectations within the Department are that the program will be fully subscribed this year. Even if the program is fully subscribed the number of allocated places, given the size of the refugee intake each year and the enormity of the problem, is pitifully small. One way to help redress the problem of women victims of violence would be to increase the number of places. The Commission recommends that the issue be considered by the Government.

Recommendation 11.14

The Department of Immigration and Ethnic Affairs should evaluate and monitor the Women at Risk program with a view to ensuring that places are fully utilised. To this end it is recommended that:

- **information regarding the Women at Risk program and how to access it should continue to be made available to the major organisations who have access to women and their dependents in refugee camps around the world**
- **information regarding the Women at Risk program and how to access it should be made available to foreign immigration departments**

In the process of monitoring and evaluating the Women at Risk program consideration should be given to increasing substantially the numbers of place available.

12. Violence and criminal law

Introduction

12.1 The previous chapters have shown that violence against women is more than a matter for the criminal law. However, the way in which the criminal law deals with the issue is a crucial part of an effective national response to it. In recent years there has been considerable work on laws dealing with violence against women, particularly sexual assault.¹²⁹⁰ However, further legislative reform is required. There is also a need for continuing education to ensure that violence against women is seen within the Australian community as a crime and that all persons working in law enforcement understand the dynamics of a violent relationship and allow for its disempowering effects on those who have been subjected to it.

Defences to crimes of violence

Introduction

12.2 The ways in which women respond to violence or threats of violence and how the legal system constructs those responses have been examined in recent years. DP 54 asked whether the criminal defences of self-defence, provocation and duress should be revised to reflect women's experiences.¹²⁹¹ Those defences are based on a standard of 'reasonable' conduct. What is 'reasonable' has traditionally been assessed on men's experiences of a reasonable response to the circumstances. For example, in establishing self-defence, there must be an immediate threat and a proportionate response. The typical scenario is that of an isolated incident in a public place between two strangers of relatively equal size, strength and fighting ability, that is, a 'bar-room brawl' model. DP 54 asked whether that test of reasonableness and its application discriminate against women.¹²⁹² Submissions concluded that the 'reasonableness' test was flawed, in that it was geared to the behaviour of a reasonable man rather than a reasonable woman.¹²⁹³ The 'bar-room brawl' model bears little relation to the situation of a woman who has been subjected to prolonged physical, mental and emotional abuse within the home by her male partner. In her terrorised state and usually with inferior physical size and strength, her only reasonable option may be to take action some time later when it is safe for her to do so. This may be during a lull in the violence, for example, when the aggressor is asleep or incapacitated by alcohol.¹²⁹⁴ However, the law may construct her act as a pre-meditated one arising out of a long held grudge rather than a defensive response triggered by a particular incident.¹²⁹⁵ For this reason it is argued that defences should be revised to reflect women's experiences of violence and acts of self-preservation.¹²⁹⁶

Self-defence

12.3 *Elements of the defence.* The law recognises that a person who has committed a violent act should be completely excused from liability where he or she acted in self-defence. Certain elements traditionally associated with the defence make it very difficult to establish in situations where a woman has killed her abuser, particularly where she has killed in fear of future deadly violence against herself or her family.¹²⁹⁷ To raise the defence successfully she must show that her conduct was a reasonable response in the circumstances. This means that the force she used was reasonably proportionate to the threat to her, that the threat was imminent, and that she was under no duty to retreat or seek to escape rather than retaliate.¹²⁹⁸ Where juries and judges lack an understanding of the dynamics and effect of violence in the home, they may not see the woman's response as 'reasonable'. They may see her use of a gun or knife as excessive force in relation to the physical assaults inflicted on her by her unarmed partner, despite the fact that those assaults may have been dangerous and potentially lethal.¹²⁹⁹ They may ask why she did not simply leave. This approach ignores the disempowering effect of the violence on the woman, her practical difficulties, such as where to go and how to support herself and her children, and her fear of retaliation if she were to leave, particularly where police assistance has not been adequate in the past.¹³⁰⁰

12.4 *Self-defence is rarely accepted.* In relatively few cases where a woman has been subjected to violence by her partner has self-defence been accepted as a defence, resulting in her acquittal. Instead she may be advised to plead guilty to manslaughter on the basis of provocation, which is more readily accepted as a partial defence in her circumstances.¹³⁰¹ She may find it difficult to resist this option when the alternative is

life imprisonment for murder. In a few cases where there is clear evidence of severe and prolonged violence against her, charges have been resolved by the exercise of the prosecutor's discretion not to proceed.

Provocation

12.5 A person may be partially excused for killing another because of the doctrine of provocation.¹³⁰² To establish provocation at common law a defendant must establish that she/he had a sudden and temporary loss of control caused by the victim's acts or words, that is, she/he acted in the heat of passion.¹³⁰³ The classic situation in which provocation has been raised is where a man kills either his wife or her lover because of her adultery.¹³⁰⁴ Submissions criticised the formulation of the defence to partially excuse men who kill their partners, even where they have deliberately acquired weapons.¹³⁰⁵ By contrast, provocation may not apply to a woman who because of fears for her safety waits until her partner is asleep or drunk before she takes action.¹³⁰⁶

*For abusive men who kill, the incident is viewed as a crime of passion, where the victim is portrayed as being the author of her own death. Notwithstanding the existence of previously controlling and violent behaviour, nor apparent signs of pre-meditation, such men have been portrayed as having acted under diminished responsibility at the time of the killing. Conversely, women are often precluded from similar use of defences due to pervasive stereotypes of women who kill; the different manner in which women kill, due to physical differences, and in terms of timing and use of weapons, amongst others . . .*¹³⁰⁷

'Battered woman's syndrome'

12.6 As a response to the inadequacies of the existing defences, the 'battered woman's syndrome' has been developed to explain to the court the actions of a woman who has suffered long-term abuse. The syndrome assumes that women who have been subjected to repeated violence suffer from 'learned helplessness' and are unable to leave or control the situation.¹³⁰⁸ Evidence of the syndrome has been accepted in Canada, the United States and in some Australian jurisdictions.¹³⁰⁹ It is most often used in cases where women are prosecuted for killing their violent partners, but its use has been extended to a wide range of other charges.¹³¹⁰ The development of the syndrome has not been without criticism. Submissions reflected those concerns and suggested that the failure of the criminal law to reflect women's experiences should be recognised and that it should be accepted that sometimes the only means of escape from violence is itself violent.

*Women who murder their partners after lengthy mistreatment should not need to defend their behaviour on the basis they 'suffer battered women syndrome'. This perpetuates a sense of weakness and illness: the hysterical woman. Women's offending should not be excused on the grounds of a supposed biological frailty. Instead the criminal law should change to reflect the experience of the entire community.*¹³¹¹

*Medicalising the experience further isolates battered women into a group whose members are considered to be abnormal or ill.*¹³¹²

Submissions also referred to the danger that women who do not outwardly display the exact set of characteristics that are said to constitute the defence may be excluded from its use.¹³¹³

*[Battered Woman's Syndrome] merely sets up a narrow exception to the male norm of 'reasonableness' for those women whose experiences comply with its requirements. In other words, it prescribes what are reasonable responses for battered women. For the rest of the population, including those women who may have been battered by their partners but not 'battered enough' to be able to claim the syndrome, the male norm remains.*¹³¹⁴

Two submissions which criticised the 'battered woman's syndrome' called for the framing of an entirely new defence that would formalise the process by which the court could be made aware of all relevant

circumstances.¹³¹⁵ However, the issue is not clearcut. There was also support for the use of the syndrome.¹³¹⁶ It is an issue which has been subject to much debate¹³¹⁷ and it clearly needs further exploration.

Criminal procedure

12.7 ***Expert evidence.*** Submissions, including those which argued the dangers of the battered woman's syndrome, called for expert evidence on the effects of violence to be made available to the courts in cases where victims or perpetrators have been killed. They also called for development of standards for that evidence.¹³¹⁸

*For some women the only way to stop the terror (in their state of mind and conditioning through the use of violence against them) is to kill their partner . . . if a hostage killed a captor whether in defence or not it is totally understandable. The need to escape, end the continual terror overrides all else. Establishing how terrorised a person who kills another [is because of domestic violence] is the only way to show the reality of that level of fear existing.*¹³¹⁹

*Too often, in the past, the experiences of women defendants have not been deemed relevant to the courts and evidence of violence or oppression has not been adduced.*¹³²⁰

12.8 ***Criticism of lawyers.*** Submissions criticised inadequate inquiry by defence lawyers into the history of violence against women defendants by their partners and its impact on them.¹³²¹ This was one of the factors to which the Queensland Court of Appeal referred in the recent case of *R v Kina*.¹³²² The Court determined that there had been a miscarriage of justice in the defendant's conviction for murder of her partner. It quashed the conviction after determining that the evidence of a history of violence by her partner was capable of raising self-defence and provocation, and was also relevant to the question of the necessary intent.¹³²³ It noted that the difficulties of communication with her legal representatives during the preparation for her trial effectively denied her satisfactory representation.¹³²⁴ Submissions also noted the need for continuing legal education at all levels on the effects of domestic violence.¹³²⁵

12.9 ***Sentencing patterns.*** Submissions commented that more lenient sentences appear to be given to many men who kill their partners 'out of passion' than to women who kill their partners after years of abuse.¹³²⁶ They called for collection of data on sentences imposed in those circumstances and research into sentencing practices.¹³²⁷ Two submissions called for review of the sentences of all women who are serving life sentences for killing a man who abused them.¹³²⁸ The need for the media to be responsible in reporting crimes where either the victim or the perpetrator has been killed was also noted.¹³²⁹

The role of the Commonwealth

Development of the uniform criminal code

12.10 Many criminal justice issues lie within State and Territory legislation. However, the Commonwealth has an important role to play. This arises from Australia's international human rights obligations.¹³³⁰ Following a major review of federal criminal laws, including principles of criminal responsibility,¹³³¹ the Commonwealth, the States and the Territories are developing a model criminal code for eventual adoption by all jurisdictions. The general principles of criminal responsibility, including self-defence, have been settled.¹³³² Uniform laws relating to crimes of personal violence, including examination of the law of provocation, are currently being developed. However, it does not appear that gender issues have been considered or that women's groups have participated in the process. The report does not refer to the battered woman's syndrome, for example, or the circumstances in which a history of violence may be relevant to the defendant's actions. Reform of such major legal importance should not proceed without the gender implications being actively explored. It would be appropriate for an expert on gender issues to be a consultant throughout the process. In Queensland a critique of the State's criminal legislation was prepared in response to similar concerns following the report of the Criminal Code Review Committee.¹³³³ No women's groups had been involved in that review. The Commission notes that the Office of the Status of Women is working on proposals for reform of sexual assault laws on a national basis.

Recommendation 12.1

In the development of the uniform criminal code, women's perspectives should be actively sought. This should include consultation with appropriate experts on those issues. It should also include a re-examination of the proposals relating to self-defence and provocation.

A unit to oversee violence against women

12.11 The importance of violence against women should be recognised by the establishment within the Attorney-General's Department of a unit to monitor and promote the development of strategies to address violence against women. While in Australia significant efforts have been made in recent years to address violence against women as a national issue, particularly through the establishment of the National Committee on Violence Against Women and the release in 1992 of the National Strategy on Violence Against Women, the problem remains widespread.¹³³⁴ The consideration of male violence against women should not be confined to a purely criminal law issue but should acknowledge the broader implications for women's rights to equality and Australia's international human rights obligations. Accordingly the Commission recommends that the Unit should be located within the Human Rights Branch of the Attorney-General's Department. Close liaison with areas responsible for criminal law policy and policing is necessary. The functions of the Unit should include annual reporting on the implementation by all levels of government of the National Strategy on Violence Against Women, the development and promotion of minimum standards to be met by service providers such as police and through State and Territory legislation, and the promotion of a 'best practice' model for dealing with violence against women in the home.

Recommendation 12.2

A Violence Against Women Unit should be established within the human rights area of the federal Attorney-General's Department. Its role should include annual reporting on the implementation of the National Strategy on Violence Against Women, the development and promotion of minimum standards to be met by service providers and through State and Territory legislation, and the promotion of a 'best practice' model for dealing with violence against women in the home.

Appendix 1: The Redfern Model

A. Principles of a court support scheme

- Given the particular sensitivity and skill required for domestic violence matters, that specialist court support schemes for women experiencing domestic violence should be established.
- Court support workers must be women. Solicitors should be women. Solicitors should be women wherever possible and practicable.
- The scheme should have paid workers and not volunteers.
- The scheme should aim to empower women by assisting them to break the negative cycle of domestic violence.
- The scheme should be based on a holistic approach. That is, it should provide a range of service including legal representation.
- The management structure of a court support scheme should be democratic, consultative and accessible.
- There should be an equitable team approach to the delivery of this service.
- An appropriate co-ordinating auspice should assume responsibility for the establishment and maintenance of the scheme.
- Evaluation should be an integral part of the scheme and the scheme should be modified in accordance with the outcome of these evaluations.

B. Goals

- to provide a high quality service that is comprehensive, sensitive and accessible to the target population;
- to provide a range of services that pragmatically assists women who are experiencing domestic violence; and
- to develop a service that is attuned to the pervasive and harmful short and long term affects of domestic violence.

C. Guidelines, aims and objectives

1. Legal Aims and Objectives:

- To provide each women seeking an Apprehend Violence Order, who falls within the guidelines of the scheme, access to legal representation;
- To provide accurate and sympathetic legal advice;
- To provide referrals to experienced family law solicitors;
- To appear on behalf of the woman until the matter is resolved or to make appropriate referrals to private solicitors;
- To ensure that, if an order is obtained, its conditions meet the needs of the complainant; and

- to be available to follow up on enforcement of the order.

2. Support Aims and Objectives:

- To familiarise the complainant with the court process, layout and personnel;
- To investigate the facts of the complaint, including:
 - full details of the complaint and related matters not included in the summons.
 - the circumstances of the complainant so that conditions appropriate to her circumstance are sought.
- To investigate any social needs of the complainant including income security, housing and counselling.
- To ensure as far as possible the personal safety of the complainant whilst in the precinct of the court.
- To be available for follow up on enforcement of an order.

3. Guidelines

The scheme will act for:

- female complainants who are or were in a relationship with the defendant;
 - spouse or ex-spouse
 - intimate personal relationship
 - relative or defacto relative
 - sharing the same household
- female complainants where there is no domestic relationship but the intention of the harassment and/or violence on the part of the defendant is that a relationship be established.
- female defendants who come within the first two categories where there is a cross-claim.
- female complainants against female complainants, where the parties are in a domestic relationship as described above, on the first return date and then if possible refer out to private practitioners.

The Scheme does not act for:

- male complainants, unless there are exceptional circumstances
- male defendants
- complainants or defendants where the complaint arises from a neighbourhood dispute.

All workers rostered on a particular civil list day must return to the co-ordinating agency to:

- finalise administrative matters;
- discuss cases;
- delegate follow-up; and
- debrief.

Wherever possible a secure room/space should be provided for complainants attending court. This room should be adequately resourced, eg refreshments, toys, etc.

Appendix 2: GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT

WOMEN REFUGEE CLAIMANTS

FEARING GENDER-RELATED PERSECUTION

Immigration and Refugee Board
Ottawa, Canada
March 9, 1993

THE ISSUE

The definition of a Convention refugee in the *Immigration Act* does not include gender as an independent enumerated ground for a well-founded fear of persecution warranting the recognition of Convention refugee status. As a developing area of the law, it has been more widely recognised that gender-related persecution is a **form** of persecution which can and should be assessed by the Refugee Division panel hearing the claim. Where a woman claims to have a gender-related fear of persecution, the central issue is thus the need to determine the **linkage** between gender, the feared persecution and one or more of the definition grounds.

Most gender-related refugee claims brought forward by women raise four critical issues which these Guidelines seek to address:

First Issue

To what extent can women making a gender-related claim of fear of persecution successfully rely on any one, or combination, of the five enumerated grounds of the Convention refugee definition?

Second Issue

Under what circumstances does sexual violence, or a threat thereof, of other prejudicial treatment towards women constitute persecution as that term is jurisprudentially understood?

Third Issue

What are the key evidentiary elements which decision-makers have to look to when considering a gender-related claim?

Fourth Issue

What special problems do women face when called upon to state their claim at refugee determination hearings, particularly when they have had experiences that are difficult and often humiliating to speak about?

THE ANALYSIS

I. DETERMINING THE NATURE AND THE GROUNDS OF THE PERSECUTION

Obviously, not all claims brought forward by women are specifically gender-related. Women frequently claim fear of persecution in common with their fellow male citizens, though not necessarily of the same nature or at the same level of vulnerability, for such reasons as belonging to an ethnic or a linguistic minority, or membership in a political movement, a trade union or a religious denomination.

General Proposition

Although gender is not specially enumerated as one of the grounds for establishing Convention

refugee status, the definition of *Convention refugee* may properly be interpreted as providing protection to women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds.

Before determining the appropriate ground(s) applicable to the claim, decision-makers must first identify the **nature** of the persecution feared by the claimant.

Generally speaking, women refugee claimants may be described by four broad categories, although these categories are not mutually exclusive or exhaustive.

Women who fear persecution on the same Convention grounds, and in similar circumstances, as men. That is, the risk factor is not their sexual status, *per se*, but rather their particular identity (ie racial, national or social) or what they believe in, or are perceived to believe in (ie religion or political opinion). In such claims, the substantive analysis does not vary as a function of the person's gender, although the nature of the harm feared and procedural issues at the hearing may vary as a function of the claimant's gender.

Women who fear persecution for reasons solely pertaining to kinship, ie because of the status, activities or views of their spouses, parents, siblings, or other family members. Such cases of "*persecution of kin*" typically involve violence or other forms of harassment against women, who are not themselves accused of any antagonistic views or political convictions, in order to pressure them into revealing information about the whereabouts or the political activities of their family members. Women may also have political opinions imputed to them based on the activities of members of their family.

Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons. In the refugee law context, such discrimination may amount to persecution if it leads to consequences of substantially prejudicial nature for the claimant and if it is imposed on account of any one, or combination, of the statutory grounds for persecution.

Women who fear persecution as the consequence for failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin. Such laws and practices, by singling out women and placing them in a more vulnerable position than men, may create conditions precedent to a gender-defined social group. The religious precepts, social traditions or cultural norms which women may be accused of violating can range from choosing their own spouses instead of accepting an arranged marriage to such matters as the wearing of make-up, the visibility or length of hair, or type of clothing a woman chooses to wear.

A. Grounds other than membership in a particular social group

Race:

There may be cases where a woman claims a fear of persecution because of her race and her gender. For example, an Asian woman in an African society can be persecuted not only for her race, but also for her gender.

Religion:

A woman who in an Islamic society, for example, chooses not to subscribe to or follow the precepts of a state religion may be at risk of persecution for reasons of religion. In the context of the Convention refugee definition, the notion of religion may encompass, among other freedoms, the

freedom to hold a belief system of one's choice or not to hold a particular belief system and the freedom to practise a religion of one's choice or not to practise a prescribed religion. In certain states, the religion assigns certain roles to women; if a woman does not fulfil her assigned role and is punished for that, she may have a well-founded fear of persecution for reasons of religion. A woman may also be perceived as expressing a political view (and have a political opinion imputed to her) because of her attitude and/or behaviour towards religion.

Nationality:

A gender-related claim of fear of persecution may be linked to reasons of nationality in situations where a national law causes a woman to lose her nationality (ie citizenship) because of marriage to a foreign national. What would constitute good grounds for fearing persecution is not the fact of losing her nationality as such (notwithstanding that such laws are discriminatory to the extent that they do not apply to men married to foreign nationals), but the consequence she may suffer as a result.

Political Opinion:

A woman who opposes institutionalised discrimination of women, or expresses views of independence from male social/cultural dominance in her society, may be found to fear persecution for reasons of imputed political opinion (ie she is perceived by the established political/social structure as expressing politically antagonistic views). Two considerations are of paramount importance when interpreting the notion of "political opinion":

- (1) In a society where women are "assigned" a subordinate status and the authority exercised by men over women results in a general oppression of women, their political protest and activism do not always manifest themselves in the same way as those of men.
- (2) The political nature of oppression of women in the context of religious laws and ritualization should be recognized. Where tenets of the governing religion in a given country require certain kinds of behaviour exclusively from women, contrary behaviour may be perceived by the authorities as evidence of an unacceptable political opinion that threatens the basic structure from which their political power flows.

B. Membership in a particular social group

In considering the application of the "membership in a particular social group" category, reference should be had to the IRB Preferred Position Paper, *Membership in a Particular Social Group as a Basis for a Well-Founded Fear of Persecution*.

Family as a particular social group

There is jurisprudential authority for recognising claims grounded in familial affiliation (ie where kinship is the risk factor) as coming within the ambit of the "membership in a particular social group" category. See, for example, *Al-Busaidy, Talal Ali Said v M.E.I.*,

. . the [Immigration and Refugee] Board has committed reviewable error in not giving due effect to the applicant's uncontradicted evidence with respect to his membership in a particular social group, namely, his own immediate family.

Gender-defined particular social group

There is increasing international support for the application of the particular social group ground to the claims of women who allege a fear of persecution solely by reason of their gender, See *Conclusion No 39 (XXXVI) Refugee Women and International Protection*, 1985, where the Executive

Committee of the United Nations High Commissioner for Refugees (UNHCR) . . .

(k) Recognised that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.

Application of the statutory ground

In applying the "membership in a particular social group" category as a ground for gender-related fear of persecution, two considerations are necessary:

(1) Most of the gender-specific claims involving fear of persecution for transgressing religious or social norms may be determined on **grounds of religion or political opinion**. Such women may be seen by the governing authorities or private citizens as having made a religious or political statement in transgressing those norms of their society, even though UNHCR *Conclusion No 39* above, contemplates the use of a particular social group as an appropriate ground.

(2) For a woman to establish a well-founded fear of persecution by reason of her membership in a gender-defined particular social group:

the fact that the particular social group consists of large numbers of the female population in the country concerned is **irrelevant** - race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.

what is **relevant** is evidence that the particular social group suffers or fears to suffer severe discrimination or harsh and inhuman treatment **that is distinguished from the situation of the general population, or from other women**.

a sub-group of women can be identified by reference to the fact of their exposure or vulnerability for physical, cultural or other reasons, to violence, including domestic violence, in an environment that denies them protection. These women face violence amounting to persecution, because of their particular vulnerability as women in their societies and **because they are so unprotected**.

refugee status being an **individual remedy**, whether or not it is based on social group membership, the woman will need to show that she has genuine fear of harm, that her gender is the reason for the feared harm, that the harm is sufficiently serious to amount to persecution, that there is a reasonable possibility for the feared persecution to occur if she is to return to her country of origin and she has no reasonable expectation of adequate national protection.

II. ASSESSING THE FEARED HARM

Claims involving gender-related fear of persecution often fall quite comfortably within one of the five grounds of the Convention refugee definition. The difficulty sometimes lies in establishing whether the various forms of prejudicial treatment or sanctions imposed on women making such claims come within the scope of the concept of "persecution".

CONSIDERATIONS

The circumstances which given rise to women's fear of persecution are often unique to women. The existing bank of jurisprudence on the meaning of persecution is based on, for the most part, the experiences of male claimants. Aside from a few cases of rape, the definition has not been widely

applied to female-specific experiences, such as infanticide, genital mutilation, bride-burning, forced marriage, domestic violence, forced abortion, or compulsory sterilization.

The fact that violence, including sexual and domestic violence, against women is universal is irrelevant when determining whether rape, and other gender-specific crimes constitute forms of persecution. The real issues are whether the violence - experience or feared - is a serious violation of a fundamental human right for a Convention ground and in what circumstances can the risk of that violence be said to result from a failure of state protection.

The social, cultural, traditional and religious norms and the laws affecting women in the claimant's country of origin ought to be assessed by reference to human rights instruments which provide a framework of international standards for recognising the protection needs of women. What constitutes permissible conduct by a state towards women may be determined, therefore, by reference to international instruments such as:

Universal Declaration of Human Rights,

International Covenant on Civil and Political Rights,

International Covenant on Economic, Social and Cultural Rights,

Convention on the Elimination of All Forms of Discrimination Against Women,

Convention on the Political Rights of Women,

Convention on the Nationality of Married Women.

A woman's claim to Convention refugee status cannot be based solely on the fact that she is subject to a national policy or law to which she objects. The claimant will need to establish that:

- (a) the policy or law is inherently persecutory; or
- (b) the policy or law is used as a means of persecution for one of the enumerated reasons; or
- (c) the policy or law, although having legitimate goals, is administered through persecutory means; or
- (d) the penalty for non-compliance with the policy or law is disproportionately severe

III. EVIDENTIARY MATTERS

In assessing a woman's claim of gender-related fear of persecution, the evidence must show that what the claimant genuinely fears is persecution for a Convention reason as distinguished from random violence or random criminal activity perpetrated against her as an individual. The central factor in such an assessment is, of course, the claimant's particular circumstances in relation to both the general human rights record of her country of origin and the experiences of other similarly situated women. Evaluation of the claimant's whole evidence as to weight and credibility ought to be conducted in light of the following considerations, among others:

A gender-related claim cannot be rejected simply because the claimant comes from a country where women face generalised oppression and violence and the claimant's fear of persecution is not identifiable to her on the basis of an individualised set of facts. This so-called "particularized evidence rule" was rejected by the Federal Court of Appeal in *Salibian v M.E.I.*, and other decisions.

Where a gender-related claim involves threats of or actual sexual violence at the hands of authorities

(or private citizens not susceptible to state control), the claimant may have difficulties in substantiating her claim with any "statistical data" on the incidence of sexual violence in her country of origin.

Decision-makers should consider evidence indicating a failure of state protection in that governing institutions and/or their agents in the claimant's country of origin may have condoned the instances of sexual violence if they had been aware of them or did nothing to prevent them.

IV. SPECIAL PROBLEMS AT DETERMINATION HEARINGS

Women refugee claimants face special problems in demonstrating that their claims are credible and trustworthy. Some of the difficulties may arise because of cross-cultural misunderstandings. For example:

Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their sad experiences of sexual violence in order to keep their "shame" to themselves alone and not dishonour their family or community.

Women from certain cultures where men do not share the details of their political, military or even social activities with their spouses, daughters or mothers may find themselves in a difficult situation when questioned about the experiences of their male relatives.

Women refugee claimants who have suffered sexual violence, may exhibit a pattern of symptoms referred to as Rape Trauma Syndrome, and may require extremely sensitive handling. Similarly, women who have suffered domestic violence may also be reluctant to testify. In some cases it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape, or in front of members and refugee hearing officers specifically trained in dealing with violence against women. Members should be familiar with the UNHCR Executive Committee *Guidelines on the Protection of Refugee Women*.

Framework of analysis

1. Assess the particular circumstances which have given rise to the claimant's fear of persecution.

- Is the form of harm feared by the claimant one that is directed at or experienced predominantly by women:
 - i. because of reasons pertaining to kinship?
 - ii. as a result of severe discrimination against women?
 - iii. on grounds of religious precepts, social mores, legal or cultural norms?
 - iv. because of their exposure or vulnerability for physical, cultural or other reasons, to violence, including domestic violence, in an environment that denies them protection

2. Assess the general conditions in the claimant's country of origin.

- (a) Is the social and political position of women in that country such that it engenders the degree of discrimination likely to amount to persecution?
- (b) Are there oppressive laws and regulations imposed specifically upon women or certain women? How severe are the penalties for non-compliance?
- (c) Do the state authorities inflict, condone or tolerate violence, including sexual or domestic violence? Do non-state groups or individuals use sexual violence against women as a

means of punishing or reinforcing their dominance over other groups?

3. Determine the seriousness of the treatment which the claimant fears.

- (a) For the treatment to likely amount to persecution, it must be a serious form of harm which detracts from women's human rights and fundamental freedoms.
- (b) In passing judgment of what kinds of treatment are considered persecution, an objective standard is provided by international human rights instruments that declare the lowest common denominator of protected interests.

4. Ascertain whether the claimant's fear of persecution is for any one, or a combination, of the grounds enumerated in the Convention refugee definition.

5. Is adequate state protection available to the claimant?

6. Determine whether, under all the circumstances including the possibility of an internal flight alternative, the claimant's fear of persecution is well-founded.

Appendix 3: List of submissions

1	The SCARLET Alliance
2	Justice for Women Action Collective
3	Confidential
4	A Hughes
5	T Welter
6	Community Legal & Advocacy Centre, Fremantle
7	Independent Teachers' Federation of Australia
8	Confidential
9	W Varna
10	Whitford Women's Health Centre WA
11	Centre Against Sexual Assault Inc, Bendigo
12	J Hammond
13	Confidential
14	M Edwards
15	Confidential
16	K Wilson
17	E Burrell
18	P Ambikapathy
19	M Varnai
20	J Hansen
21	I Goldsmith
22	M Dietrich
23	JP McCarthy
24	JA Gardener
25	K Lesley
26	Telopea Family Resources NSW
27	Freedom From Violence Action Group Women's Electoral Lobby VIC
28	M Gleeson
29	P Prezzi
30	S Roach Anleu
31	C Pollard
32	Humanist Society of Victoria Inc
33	A Cox
34	T Clements
35	MP Garrett
36	M Loh
37	C Cleary
38	B Burns
39	L Warner
40	A Thacker
41	D Riley
42	M Wells
43	K Olsen
44	J Morgan
45	G Kelly
46	C Major
47	C Thompson
48	K Mack
49	Australian National Consultative Committee on Refugee Women
50	Confidential
51	N Kacowicz
52	E Burrell
53	A Jackson
54	S Clarke
55	P Eastal

56	A Hosken
57	J Walsh
58	National Committee to Defend Black Rights
59	Equal Employment Opportunity Unit, University of Newcastle
60	Prostitutes Association of South Australia
61	S Reynolds
62	S Thompson
63	English Department, Maroochydore State High School QLD
64	Anonymous
65	T O'Brien
66	MP Garrett
67	S Bacsí
68	R Friend
69	Equal Opportunity Office, University of Adelaide
70	J McLennan
71	PC Schaper
72	R Rana
73	Confidential
74	B Humphries
75	SM Jones
76	AJ Kenos
77	P Atkinson
78	Confidential
79	P Easteal
80	Australian Institute for Women's Research and Policy
81	L Savage, T White
82	Y Murray
83	Confidential
84	B Campbell
85	J D Duff
86	VA Cook
87	C Bray
88	FE Ollif
89	M Nouikov
90	A Constantinou
91	J Hannell
92	M Redfern
93	Older Women's Network, Canberra
94	LJ Nolan
95	V Mason
96	JF Laidlaw
97	Bunbury Community Legal Centre WA
98	Bunbury Domestic Violence Action Group WA
99	D Herbert
100	Confidential
101	Confidential
102	Confidential
103	Confidential
104	Confidential
105	Confidential
106	Confidential
107	Confidential
108	Confidential
109	Waratah Support Centre, Bunbury
110	L Yate, C O'Rielly
111	J Bleyerveld
112	S Robertson

113	Women's Electoral Lobby, Cairns
114	Tablelands Women's Centre, QLD
115	Confidential
116	Confidential
117	Women of Far North Queensland
118	R McBain
119	P O'Hara
120	J Hair
121	B Kelly, N Ahmat
122	Z Pobucky, C Almain-Leyson
123	Confidential
124	C Smyth
125	Confidential
126	Women's Health Centre, Rockhampton
127	G Mather
128	Confidential
129	Confidential
130	Confidential
131	Confidential
132	Confidential
133	Confidential
134	Confidential
135	Confidential
136	Confidential
137	Confidential
138	Confidential
139	Confidential
140	Confidential
141	Confidential
142	Victims of Crime Service Inc SA
143	S Anchor
144	E Ferriday
145	M Flynn
146	J Braithewaite
147	Endeavour Forum South West Region
148	Domestic Violence Advocacy Service, Sydney
149	S Owens
150	Women's Action Group NSW
151	Australian Federation of Business and Professional Women Inc
152	A Hoban
153	L Lucas
154	M Wilson
155	J Cradick
156	L Jackson
157	RJ Anderson
158	H Haddrill
159	Confidential
160	Women's Equal Opportunity Area, University of Queensland
161	Confidential
162	Taxation Institute of Australia
163	C Higginson
164	Prostitutes Collective of Victoria Inc
165	Bar Association of Queensland
166	The Law Society of NSW
167	Public Sector Union Queensland Branch
168	Confidential
169	L Stidwill

170 Norwood Community Legal Centre SA
171 Association for Services to Torture and Trauma Survivors Inc WA
172 Leichhardt Women's Community Health Centre Inc NSW
173 Presbyterian Women's Association of Australia
174 C Kennedy
175 N Roxon, K Walker
176 Confidential
177 MM Blake
178 Ms McClellan
179 R Wilkinson
180 RC Stevens
181 N Freeman
182 Upper Murray Centre Against Sexual Assault SA
183 Council of Australian Postgraduates Associations Inc
184 J Mulburn
185 Menstrual Management Research Team, Department of Social Work and Social Policy,
University of Queensland
186 Gosnells District Information Centre Inc WA
187 Confidential
188 Confidential
189 T Lambert
190 Confidential
191 M Bayles
192 M Anderson
193 Gay and Lesbian Rights Lobby and the Lesbian and Gay Legal Rights Service, Sydney
194 The Vietnam Veterans Family Support Link Line NSW
195 Sisters-in-Law
196 Womens Health and Sexual Assault Education Unit NSW
197 Centre Against Sexual Assault, CASA House, Melbourne
198 Confidential
199 L Armytage
200 Australian Family Association
201 Confidential
202 Country Women's Association of NSW
203 Confidential
204 Confidential
205 Confidential
206 P Wright
207 Youth Legal Service, Perth
208 Children by Choice Association QLD
209 A O'Connor
210 A Chopra
211 S Blaikie
212 K Geiselhart
213 J Doust
214 T Brandrup
215 H Katzen
216 Western Suburbs Legal Service Inc VIC
217 Confidential
218 R Holloway
219 Confidential
220 G Barnes
221 M Clarke
222 R Owens
223 A Longworth
224 Confidential
225 Women's Abortion Campaign QLD

226	J Grbich
227	JT Carney
228	E Sitarenos
229	J Benson
230	Mental Health Legal Centre Inc VIC
231	Child Protection Services SA
232	B Kozyrski
233	C Kindleysides
234	W Welsh
235	L McKenzie
236	Legal Services Commission of SA
237	Logan Youth Legal Service, QLD
238	K Isaacs
239	Northern Community Legal and Welfare Rights Centre TAS
240	Welfare Rights and Legal Centre ACT
241	M Reynolds
242	Working Women's Centre NSW
243	Confidential
244	P Cowburn
245	G Corness
246	S Nord
247	Australian Women's Research Centre, Deakin University
248	A Cleland
249	Outer East Domestic Violence Outreach Service Collective Inc VIC
250	NSW Sub-Committee on Sexual Assault and People with an Intellectual Disability
251	Lesbian Legal Rights Group VIC
252	GL & LT McCulloch
253	Confidential
254	Women Lawyers Association QLD
255	Women's Lawyers Association NSW
256	Women's Legal Resources Centre, Sydney
257	J Brooke
258	Women Lecturers and Students of the Faculty of Law, University of Tasmania
259	J Abbott
260	J Skinner
261	D Ali
262	Confidential
263	Confidential
264	I Dunn
265	Confidential
266	R Walker
267	B Gaze
268	M Thornton
269	Confidential
270	A Vincent
271	KJ Uppgard
272	B Hatch
273	S Goiser
274	S Armstrong
275	North Queensland Combined Women's Service
276	S Gilmour
277	J Clark
278	C O'Connor
279	Central Coast Community Women's Health Centre NSW
280	Tasmanian Gay & Lesbian Rights Group
281	Women's Electoral Lobby Australia Inc
282	M Dando

283 CD Wilcock
284 Illawarra Legal Centre NSW
285 Women's Adviser's Unit South Australian Department of Labour
286 Women's Policy Unit and Women's Advisor to the Premier, Office of the Cabinet Queensland
287 Project for Legal Action Against Sexual Assault VIC
288 G Trifiletti
289 Community Legal and Advocacy Centre, Fremantle
290 R Martin
291 M Martin
292 R Alexander, F Fomin, M Fried, E Gray, C Lamble, K Robertson & S Panagiotidis
293 Confidential
294 Legal Aid Office ACT
295 Domestic Violence Resource Centre, Woolloowin QLD
296 L Intemann
297 M Mazaroli
298 Harvey Business and Professional Women's Club WA
299 Wesley Central Mission, Melbourne
300 ST Rohde
301 L Steer
302 B Oxenham
303 Older Women's Network Australia Inc, Sydney
304 Older Women's Network TAS
305 Confidential
306 Domestic Violence Legal Help, Darwin
307 Women's Electoral Lobby VIC
308 Co-ordinator, Women's Action Alliance Australia Inc
309 Doveton & District Legal Service VIC
310 Confidential
311 ACTU Queensland Branch
312 National Children's and Youth Law Centre
313 Confidential
314 J Lamprey
315 Women's Council, SA Liberal Party
316 Regular Defence Force Welfare Association ACT
317 J MacNee
318 Confidential
319 Women Incest Survivors Network NSW
320 A Dayman
321 Council of Adult Education, Melbourne
322 Social Security Working Group, Federation of Community Legal Centres Inc VIC
323 L Murphy
324 Queensland Law Society Inc
325 C Woods
326 R Gibson
327 I Shaw
328 T Jeffcoat
329 Mt Pritchard Family Resource Centre NSW
330 Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC
331 J Trutwein
332 Queensland Nurses' Union of Employees
333 C MacDonald, S Jackson, E Webb, F Martin, J Boland
334 SP Robson
335 Law Institute of Victoria
336 NSW Child Protection Council
337 Anti-Discrimination Commissioner QLD
338 Sex Discrimination Commissioner Cth

339 Council of Australian Postgraduate Associations
340 H Hoekman
341 Attorney-General and Minister for Women's Affairs VIC
342 National Women's Consultative Council NSW
343 S Carpenter
344 A Lucadou-Wells
345 Confidential
346 Confidential
347 J Blokland
348 Schools Curriculum, Department of Employment, Education and Training
349 Affirmative Action Agency Cth
350 Ministry for the Status and Advancement of Women NSW
351 Sutherland Shire Family Support Service NSW
352 L Santo
353 Privacy Commissioner NSW
354 Women's Law Collective, University of Melbourne
355 U Muller
356 M Hodgkinson
357 C Gellatly
358 M Wanjurri Nungala
359 Office of Women's Interests, Perth
360 Women's Legal Service Steering Committee WA
361 Women's Electoral Lobby, Perth
362 Marnja Jarndu Women's Refuge WA
363 H Andrews, Equal Opportunity Commission WA
364 Confidential
365 Confidential
366 Confidential
367 Confidential
368 Confidential
369 Confidential
370 Confidential
371 Confidential
372 Confidential
373 Women's Health & Counselling, Perth
374 Council for Civil Liberties WA
375 A Hindle
376 Supporting Our Sisters
377 N Hopkins
378 National Council of Women of Australia
379 Women's Legal Service Inc, Brisbane
380 R Neumann
381 Domestic Violence Resource Centre, Lutwyche QLD
382 Confidential
383 Confidential
384 Confidential
385 Confidential
386 Confidential
387 C Karp
388 Migrant Women's Emergency Service QLD
389 South Brisbane Legal Service
390 B Holmes
391 Bureau of Ethnic Affairs NSW
392 Confidential
393 Confidential
394 M Alston
395 Confidential

396	Confidential
397	Confidential
398	Confidential
399	A Kinnear, L Howard
400	F David
401	D Cass
402	G Horn
403	WISE
404	K Walker, M Stewart
405	A Guy
406	Confidential
407	Confidential
408	Confidential
409	Confidential
410	Confidential
411	Confidential
412	Confidential
413	Confidential
414	Confidential
415	Confidential
416	J Harrison
417	M McDonald, M Griffiths
418	Prostitutes Association of Northern Territory for Health, Education and Referral Inc
419	D Barclay
420	J Durling
421	M Bull
422	Domestic Violence Legal Help, Darwin
423	L Defrenne
424	J Kopal
425	Confidential
426	Confidential
427	Confidential
428	Confidential
429	Confidential
430	C Woodman
431	P Ditton
432	L Young
433	Central Australian Advocacy Service
434	K McNab
435	M Kennedy
436	H McDonald
437	Office for the Status of Women TAS
438	Confidential
439	Confidential
440	Confidential
441	Confidential
442	Confidential
443	M Court
444	D Childs
445	L Brady
446	D Port
447	National Council of Women, Launceston
448	R Tyler
449	O Inglis
450	L Van Zetten
451	F Layton
452	E Trigg

453	Domestic Violence Action Group, Port Lincoln
454	Port Lincoln Aboriginal Organisation
455	Confidential
456	Confidential
457	Confidential
458	Confidential
459	J Waters
460	A Caselyr
461	E Ling
462	Confidential
463	Confidential
464	Confidential
465	Confidential
466	DM Newton
467	CM Brazel
468	A McCleary
469	Adelaide Latvian Multinational Artists Society
470	L Johnson-Riordan
471	A Jackson
472	Victims of Crime Service, Adelaide
473	R McInnes
474	G Sutcliffe Huigol
475	Confidential
476	Confidential
477	Confidential
478	Confidential
479	Confidential
480	Confidential
481	Confidential
482	Confidential
483	Confidential
484	G Romeyko
485	J Van Den Berg
486	W Cato
487	Confidential
488	LG Viant
489	H Wardle
490	L O'Connor
491	Confidential
492	Confidential
493	Townsville Community Legal Service Inc
494	M Balgew
495	D Gray
496	P Cook
497	L Goodchild
498	North Queensland Combined Women's Service
499	Confidential
500	Confidential
501	Confidential
502	Confidential
503	Confidential
504	Confidential
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506	Confidential
507	Confidential
508	Confidential
509	Confidential

510 Commissioner for Equal Opportunity VIC
511 Feminist Lawyers, Melbourne
512 Federation of Community Legal Centres, VIC
513 M Morsan-Utto
514 S McGreggor
515 L Danaan
516 D Walsh
517 T Miskin
518 S Eastwood, L Jackson, S Warren
519 C Fagan, M Dimopoulos
520 National Women's Network of Disabled People's International, Australia
521 E Studer
522 C McDowell
523 N Yakimova
524 S McGregor
525 Confidential
526 Confidential
527 Confidential
528 Confidential
529 Confidential
530 Confidential
531 Confidential
532 Confidential
533 Confidential
534 Tasmanian Women's Consultative Council
535 Confidential
536 U Mawson
537 D McCulloch, K Conley, M Martinelli, M Mati, R Walsh
538 F McGrath
539 N Eason
540 Sexual Assault Referral Centre NT
541 National Conference of Community Legal Centres
542 Confidential
543 Office of the Status of Women Cth
544 T Jowett
545 P Lockwood
546 Women Into Politics, A Coalition of Women's Organisations
547 Women Advocates for Gender Equality, Sydney
548 Office of Indigenous Women, ATSIC
549 Confidential
550 Chief Justice Miles ACT
551 Aboriginal & Torres Strait Islander Corporation for Women QLD
552 Australian Consumers' Council
553 Confidential
554 A Scarff
555 Immigration Advice and Rights Centre, Sydney
556 K Thickens
557 L Spender, A Durbach, L Carner
558 Aboriginal Women's Legal Issues Group, Sydney
559 J Wilczynski
560 Ms Logan
561 J Ellenbogan
562 M Krnjic
563 Federation of Ethnic Communities' Councils of Australia Inc
564 Confidential
565 Confidential
566 L Farmer

567 A Lynch
568 L Ollif
569 M Kinkley
570 L Wright, Women's Officer, Independent Teachers Federation
571 R Elion-Griffin
572 Confidential
573 Queensland Domestic Violence Council, Brisbane
574 C Dewberry
575 P Paget
576 Confidential
577 E Kullack
578 Confidential
579 R Hylton
580 Confidential
581 L Johnson
582 KJ Mazzarol
583 K Carrington
584 Confidential
585 Department of Immigration and Ethnic Affairs Cth
586 RG Willemsen
587 R Rubio
588 Legal Aid Commission of NSW
589 Australian Section of International Commission of Jurists
590 Darwin Homebirth Group NT
591 North East Centre Against Sexual Assault VIC
592 M Dimopolous
593 Abortion Law Repeal Association NSW
594 Confidential
595 JA Davies
596 National Council of Women of NSW Inc
597 Status of Women Commission, UNAA SA Division
598 Lone Fathers Association WA
599 L Savage
600 P Page
601 The New England Bankwatch Group, Armidale NSW
602 The Directors of the Legal Aid Commission's of Australia
603 A Dunne
604 Essendon Community Legal Centre Inc VIC
605 Confidential
606 Confidential
607 Attorney-General's Department, Cth
608 Amnesty International Australia
609 S Marchi

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 RRT Case no BV93/00055 dated 4/2/94
 RRT Case no BV93/00863 dated 18/2/94
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¹ This section provides: 'The Commissioner may, of his or her own motion, investigate conduct that appears to be unlawful under Part III, V, VII or section 66'.

² Justice Elizabeth Evatt dissents from this recommendation to the extent that it covers non-financial contributions. In her view the equality principle makes it unnecessary to include non-financial contribution except perhaps where violence may be relied on to counter the argument of a substantially greater contribution by the other party.

³ CEDAW art 2.

⁴ Australian Law Reform Commission Discussion Paper 54 *Equality before the law* ALRC Sydney 1993 (ALRC DP 54).

⁵ The Commission's reference on privacy is the only one to receive a higher number of submissions. However, those were received over a period of more than three years.

⁶ Australian Law Reform Commission Report No 67 (Interim) *Equality before the law* ALRC Sydney 1994 (ALRC 67).

⁷ Access to Justice Advisory Committee *Access to Justice - an action plan* AGPS Canberra 1994, 59.

⁸ Standing Committee on Legal and Constitutional Affairs *Gender Bias and the Judiciary* Senate Printing Unit Canberra 1994, Recommendation 7.

⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* Australian Government Publishing Service Canberra 1992.

¹⁰ See for example RJ Rimmer & SM Rimmer *More Brilliant Careers* Women's Research and Employment Initiatives Program, Women's Bureau, Department of Education Employment and Training Canberra 1994, 64; Law Society of New South Wales *Getting Through the Door is not Enough: An Examination of the Equal Employment Opportunity Response of the Legal Profession in the 1990s* Law Society of New South Wales Sydney 1993.

¹¹ See ch 4, 5, 6, 7.

¹² Calculated from 1991 figures provided in Australian Bureau of Statistics *Estimated Resident Population by Marital Status, Age and Sex, Australia* ABS Canberra 1992.

In 1992, 40% of young women aged between 20-24 years had post-school qualifications compared to 25% of women aged between 55-69 years; Australian Bureau of Statistics *Women in Australia* ABS Canberra 1993, 91.

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eg SCARLETT Alliance *Submission 1*; Women of Far North Queensland *Submission 117*; Prostitutes Collective of Victoria Inc *Submission 164*; Gay and Lesbian Rights Lobby and the Gay and Lesbian Rights Service, Sydney *Submission 193*; Lesbian Legal Rights Group VIC *Submission 251*; Tasmanian Gay and Lesbian Rights Group *Submission 280*; National Children's and Youth Law Centre *Submission 312*; Domestic Violence Action Group, Port Lincoln *Submission 453*.

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As stated in the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Rhetoric or Reality?* Report of the Inquiry into the Implementation of the Access and Equity Strategy 1993, the 1986 Census indicated that 36 000 Aboriginal and Torres Strait Islander people spoke an indigenous language. Of these, 2000 spoke no English and 8500 did not speak it well. The Report further noted that even where English is the first language it is often Aboriginal English, which is a separate dialect from the Standard Australian English.

Migrant Women's Emergency Service QLD *Submission 388*; South Brisbane Legal Service *Submission 389*; S Goiser *Submission 273*; Women of Far North Queensland *Submission 117*.

Recent estimates by the ABS put the total value of unpaid work undertaken in Australia by homemakers and by volunteers in the range of \$137 billion to \$163 billion. This is equivalent to between 52% and 62% of the value of the official level of national production: Australian Bureau of Statistics *Women in Australia* 1993, Table 5.20, 152.

Press Release, Women in Agriculture, 1994 International Conference. The conference is scheduled for July 1994.

See the recent analysis of M Bittman *Juggling Time: How Australian Families Use Time* Office of the Status of Women Australian Government Publishing Service Canberra 1991; Australian Bureau of Statistics *Women in Australia* ABS Canberra 1993.

One study found that in 1992 Australian men spent an average of four and a half hours a day in activities associated with the paid workforce, but under two hours on domestic chores and child-care. By comparison, women spent an average of just over two hours on paid employment and almost four hours on child-care and domestic work: Australian Bureau of Statistics *How Australians Use their Time* ABS Canberra 1993, Table 2, 8.

29.7%: Australian Bureau of Statistics *Women in Australia* ABS Canberra 1993, Table 2.2, 20.

Australian Bureau of Statistics *Labour Force Status and Other Characteristics of Families* ABS Canberra 1993 (6224.0).

Australian Bureau of Statistics *Australia's Families 1992* ABS Canberra 1993.

This is not to suggest that the law takes full cognisance of this: see for example, the recent trend toward 'equality' discourses in child custody, based in part on a (false) assumption that women and men share child care equally: see R Graycar, 'Equal Rights versus Fathers' Rights: The Child Custody Debate in Australia' in C Smart & S Sevenhuijsen (ed) *Child Custody and the Politics of Gender* Routledge London 1989. For an explicit judicial statement of this assumption, see *Gronow v Gronow* (1979) 144 CLR 513 esp at 528, per Mason and Wilson JJ. Of course, this fact has other consequences: it has for many years been one of the main factors not only limiting women's access to the paid work force directly, but reinforcing discriminatory attitudes about 'separate spheres'.

See for example J Lewis 'It all Really Starts in the Family ...Community Care in the 1980s' (1989) 16 *Journal of Law and Society* 8; S Moore 'Community Care or Women's Work? Women, Community Care and Social Policy' (1989) (February) *ASW Impact*; N Fraser *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* University of Minnesota Press Minneapolis 1989, 147-151 (and see works cited there); J Finch & D Grove (eds) *A Labour of Love: Women, Work and Caring* Routledge London 1983.

The Office of Women's Affairs Victoria in consultation with the Standing Committee of the Commonwealth and State Women's Advisers *The Price of Care: A Progress Report on Women as Carers from the Conference of Commonwealth/State Ministers for the Status of Women* Office of Women's Affairs Victoria Melbourne 1994, 5-6.

Human Rights and Equal Opportunity Commission *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* HREOC Sydney 1993, 524. This comment was made concerning the older people with a mental illness.

L Savage & T White *Submission 81*.

R Gibson *Submission 326*.

Women's Adviser's Unit South Australian Department of Labour *Submission 285*.

P Lockwood *Submission 545*.

Confidential *Submission 368*; S Goiser *Submission 273*; A Lucadou-Wells *Submission 344*; Illawarra Legal Centre NSW *Submission 284*.

S Goiser *Submission 273*.

ibid.

In February 1994 almost half (46.7%) of the Australian women aged over 15 were in full or part time employment compared to two thirds (65.3%) of the men: Australian Bureau of Statistics *The Labour Force Australia February 1994* ABS Canberra 1994, Table 18, 23. This is a lower overall rate of participation for women than in 1992: see Australian Law Reform Commission Discussion Paper 54 *Equality Before the Law* ALRC Sydney 1993, para 9.4.

In 1992 45% of women born in non-English speaking countries held post-school qualifications compared to an average of 52% for all women: Australian Bureau of Statistics *Women in Australia* ABS Canberra 1993.

ibid. 33% compared to 39% of Australian-born women.

DP 54 ch 9.

The average weekly wage of women in full time employment is \$546.70 compared to men in full time work who earn \$648.70: Australian Bureau of Statistics *Labour Force Status and Other Characteristics of Families* ABS 1994 (6302.0).

In February 1994 41.1% of Australian women in paid employment were employed on a part-time basis compared to only 10.1% of men: calculated from figures provided in Australian Bureau of Statistics *The Labour Force Australia February 1994* ABS Canberra 1994, Table 4, 10.

In August 1992 31% of female employees were employed on a casual basis compared to 16% of male employees: Australian Bureau of Statistics *Women in Australia* ABS Canberra 1994, 124.

Women constituted almost 91% of sole parents in August 1992: Australian Bureau of Statistics *Women in Australia* ABS Canberra 1993, Figure 2.2, 19. They also constituted over 94% of sole parent pensioners: Australian Government *Women's Budget Statement 1993-94* Budget Related Paper No 4 AGPS 1993, 241. The number of women in receipt of Sole Parent pensions increased from 270 800 in June 1992 to 280 900 in June 1993: ibid 241.

For discussion see R Graycar & J Morgan *The Hidden Gender of Law* The Federation Press Sydney 1990, ch 6 and 7.

Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322*.

This followed up the study P McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* Prentice-Hall Sydney 1986.

K Funder et al *Settling Down: Pathways of Parents after Divorce* Australian Institute of Family Studies Melbourne 1993, 137.

id 156-174. To the Commission's knowledge no studies have yet been undertaken on this issue.

This was found for 69% of the women but only 4% of the men: K Funder et al *Settling Down: Pathways of Parents After Divorce* Australian Institute of Family Studies Melbourne 1993, 103.

See ch XR. For a discussion of the non-availability of legal aid in many property cases.

Anti-Discrimination Board NSW *Guidelines for lenders* Anti-Discrimination Board Sydney 1990, 1.

L J Nolan *Submission 94*.

LJ Nolan *Submission 94*; S Thompson *Submission 62*; J McLennan *Submission 70*. For an example of a reported case see *Mercantile Mutual Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32. There the respondent's late husband had forged her signature on an instrument varying the mortgage on land of which she was the sole proprietor. At no stage did the bank communicate directly with the respondent concerning the variation to the mortgage. The Court of Appeal noted that 'One can see at work... the remnants of an attitude to a wife, as a mere extension of the husband's property and financial interests.' Cf *Gough v Commonwealth Bank of Australia* Unreported NSW Court of Appeal 31 May 1994.

J McLennan *Submission 70*.

S Thompson *Submission 62*. See A Taylor *How to Get out of Sexually Transmitted Debt: A Guide for Workers Assisting Women in Debt* The Women and Credit Task Group Melbourne 1990.

Anti-Discrimination Act 1977 (NSW); *Equal Opportunity Act 1984* (VIC); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1991* (QLD); *Anti-Discrimination Act 1992* (NT). Tasmania does not have anti-discrimination legislation. The Tasmanian Government has stated that it intends to introduce sex discrimination legislation in the Budget Session of Parliament this year. See ch 3.

Of the 783 complaints lodged under the SDA in the period 1 July 1992 to 30 June 1993, 292 concerned sexual harassment alone and a further 74 involved a complaint of sexual harassment and sex discrimination: Human Rights and Equal Opportunity Commission *Annual report 1992-93* Australian Government Publishing Service Canberra 1993, Table 12, 255. *Anti-Discrimination Act 1991* (QLD) has the broadest and most comprehensive sexual harassment provisions in Australia. A random telephone survey of 411 young women aged between 16 and 25 conducted for the Human Rights and Equal Opportunity Commission found that 24% had experienced sexual harassment in the form of verbal or physical abuse, a threat to continuing employment or advancement or a combination of these: Human Rights and Equal Opportunity Commission *Executive Report of a Survey of Young Women in the Workplace* HREOC Sydney 1990, Table 13 (unpublished). A two-day phone-in on sex discrimination against women conducted in September 1993 by the Tasmanian Women's Consultative Council found that the most common problem suffered by the 125 callers (68%) was sex discrimination in the workplace. Of those women reporting employment discrimination, sexual harassment was by far the most common problem, being described by 71.6% of those women: Tasmanian Women's Consultative Council *Women and Sex Discrimination: A Report on the Results of the Statewide Phone-in conducted by the Tasmanian Women's Consultative Council for the Minister of the Status of Women The Hon Peter Hodgman MHA TWCC Hobart 1994*, 5.

Confidential *Submission 198*.

R Owens *Submission 222*.

In August 1992 only 33% of part time employees were entitled to sick and recreational leave benefits compared with 93% of full time employees: Australian Bureau of Statistics *Employment Benefits Australia August 1992* ABS Canberra 1993, 5.

A recent ABS survey conducted in Adelaide showed that women were being employed on a casual basis when in fact their work was not casual in the sense of being intermittent or short term. Of the casual workers surveyed about changes in their working lives over the past ten years 29.7% had experienced no changes whatsoever, 53.2% had not had a break from employment of three months or more, 62.4% had not changed employer and 53.6% had not changed their working arrangements (ie hours worked, shifts, basis of employment). Quoted in Women's Advisor Unit South Australian Department of Labour *Submission 285*.

M Burgmann 'Industrial relations, unions and EEO' *Paper 'Crossroads' Conference 20-21 September Sydney 1993*; R Hunter 'Representing gender in legal analysis: a case/book study in labour law' (1991) 18 *Melbourne University Law Review* 305, 310.

Gender segmentation may actually have increased slightly over the last 20 years. Department of Industrial Relations *Labour Standards for Women in Australia: Statements made by the Social Partners to the ILO Asian/Pacific Symposium on Equality for Women Workers* Canberra 1991, 3.

Women's Bureau Department of Employment Education and Training (1994) 15(1) *Women and Work* DEET, 3-4.

As at August 1992: Australian Bureau of Statistics *Women in Australia* ABS Canberra 1993, 125-6.

Private Hospitals' Doctors and Nurses (ACT) Award 1972 (1986) 300 CAR 185; for a discussion of this case see J Innes 'Discrimination: The ACTU's Comparable Worth Case' (1986) 11 *Legal Service Bulletin* 86; D Brereton 'Comparable Worth Rejected' (1986) *Legal Service Bulletin* 87.

Bureau of Ethnic Affairs *Submission 391*; Sisters-in-law *Submission 195*; S Goiser *Submission 273*; Australian Federation of Business and Professional Women Inc *Submission 151*.

J Scutt 'Enterprise bargaining vs centralised wage fixing' in K Tully *Women and Enterprise Bargaining: Who Benefits? Final report from the NWCC Forum Held in Sydney on 29 May 1992* National Women's Consultative Council Canberra 1993, 21-23; M Burgmann 'Industrial relations, unions and EEO' *Paper 'Crossroads' Conference 20-21 September Sydney 1993*.

National Women's Consultative Council NSW *Submission 342*. See also C Alcorso & G Hage *Bargained Away? Enterprise Bargaining and Non-English Background Women Workers; Policy Paper 2* Association of Non English Speaking Background Women of Australia April 1994. The Commission also received evidence that older women will also be disadvantaged in enterprise bargaining.

RJ Rimmer & SM Rimmer *More Brilliant Careers* Women's Research and Employment Initiatives Program, Women's Bureau, Department of Education Employment and Training Canberra 1994, 64 (unpublished). The study also found that 80.5% of the women had had at least one career break, and full time female workers often earned less after such a break, even if they returned to the same type of job. Upon returning to work after the first break 71.6% of the women continued to do a disproportionate share of the housework even if this work had been shared more evenly before: id 51-93.

Wesley Central Mission, Melbourne *Submission 299*.

In May 1993 74.7% of managerial positions were occupied by men: Australian Bureau of Statistics *Distribution and Composition of Employee Earnings and Hours - Australia May 1993 Preliminary* ABS Canberra 1993, 1. A survey of private organisations found that in 1992 only 1.3% of female employees occupied senior management positions, while 10.1% of men did. The proportion of women had decreased from 2.5% in 1984. While the number of women in middle management positions remained relatively stable over the same period, the number of men in these positions rose from 21.6% to 33.9%: LV Still et al *Women in Management Revisited: Progress, Regression or Status Quo* 1993, 6 (unpublished).

Women represented 37% of those trained to become chartered accountants between 1991 and 1993, with an 18% increase between 1992 and 1993: figures quoted in *Sydney Morning Herald* 1 December 1993, 13. A recent survey of Australia's 20 largest accountancy firms found that women rarely progress past middle management, and that senior management positions are still predominantly held by men. Only 17% of managers were female. Women were also concentrated in part-time positions, constituting 87% of the part-time workforce but only 45% of the full-time workforce: Accountancy Placements 'Women an underutilised resource, says Accountancy Placements' *Press release* 8 March 1993.

While about 46% of federal public servants are female, only 30% of senior officers are female: figures cited in D Smith & A Catalano 'Pay dirt: why women earn less' *Sydney Morning Herald* 1 December 1993, 13. Further, while increasing numbers of women are entering the Senior Executive Service (SES) only 13% of SES officers are women. SES women also tend to be found in areas such as social security and education and training. Women represent only 3% of SES officers in the Treasury, and 9% of the Heads of Mission in Foreign Affairs and Trade: A Henderson 'Romancing the ceiling - Australia's feminine campaign' (1993) 16 *Commercial Issues* 5.

Women form a significant proportion of school teachers, yet are not proportionately represented at the higher levels of the profession as principals or head teachers. In tertiary education the position is similar. Women comprise 80.3% of teachers in primary schools, but only 11.7% of principals of larger primary schools: figures cited in D Smith & A Catalano 'Pay dirt: why women earn less' *Sydney Morning Herald* 1 December 1993, 13. While 51% of secondary school teachers in 1991 were women (Australian Bureau of Statistics *Women in Australia* ABS Canberra 1993, 105), only 29.4% of head teachers are female: figures cited in D Smith and A Catalano 'Pay dirt: why women earn less' *Sydney Morning Herald* 1 December 1993, 13. In tertiary institutions between 1985 and 1992 there was a steady increase in the number of female academic staff at all levels: Department of Employment Education and Training *Higher Education Series Report No 18* DEET Canberra 1993, 1. The most significant increase was above the level of senior lecturer with women constituting 10% of staff at this level in 1992 compared to 7% in 1988. Nonetheless female staff are still predominantly at the lecturer level or below. In 1992 around 80% of female academic staff were classified as lecturer or below lecturer compared to only 48% of male academic staff. On the other hand only 5% of female staff were of above senior lecturer level compared to 23% of male staff. These rates have not changed much since 1988: id 2. Female academics are also less likely to have tenure terms than male academics, and are concentrated in the 'traditional female' areas such as health, education, arts, humanities and social sciences and are under-represented in the sciences, engineering, architecture and agriculture: ibid, 1.

C MacDonald *Submission* 333.

In Victoria there has been an increase in the proportion of female lawyers who practised as solicitors (from 12% in 1980 to 20% in 1989), held employee practising certificates (from 22% to 35% over the same period) and worked in private practice, in corporations and for government departments. Nonetheless, the proportion of women who are partners in law firms and who hold full practising certificates has remained constant: J Ewing et al *Career Patterns of Law Graduates* Law Institute of Victoria Melbourne 1990, 56. Only 11% of those who enter partnerships within their first five years of practice in Victoria are female, while 89% are male: C Bartlett 'Women and the Law - Facts and Figures' *Paper* 'Women in the legal profession' *Seminar* 26 November Melbourne 1993. In NSW, despite a 23.6% increase in the number of female practitioners between 1984 and 1993, in 1993 only 7.7% of the partners in law firms were women. This does not represent an increase over time. In 1990 the proportion was 7.4% and 7.2% in 1992: Law Society of New South Wales *Getting Through the Door is not Enough: An Examination of the Equal Employment Opportunity Response of the Legal Profession in the 1990s* Law Society of New South Wales Sydney 1993, 4-5.

See for example C Bartlett 'Women and the Law - Facts and Figures' *Paper* 'Women in the legal profession' *Seminar* 26 November Melbourne 1993.

For example among Victorian law graduates, women make up the greatest proportion of those earning up to \$50 000 annually, while men made up the greatest proportion of those earning above \$50 000: J Ewing et al *Career Patterns of Law Graduates* Law Institute of Victoria Melbourne 1990, 33.

As at 7 April 1994: figures supplied by the NSW Bar Association.

89.2%. 52 of the 60 Family Court judges, 33 of the 35 Federal Court judges and 6 of the 7 High Court judges are male.

Law Society of New South Wales *Getting Through the Door is not Enough: An Examination of the Equal Employment Opportunity Response of the Legal Profession in the 1990s* Law Society of New South Wales Sydney 1993, 6.

Australian Government *Women's Budget Statement 1993-94* Budget Related Paper No 4 Australian Government Publishing Service Canberra 1993, 319.

For example in April 1994 the seventh National Labor Women's Conference resolved to call upon the 1994 National ALP Conference (to be held in September 1994) to increase the proportion of female MPs to 40%. The Victorian and South Australian State Labor Parties have both set targets of 35% female representation.

Women Into Politics, A Coalition of Women's Organisations *Submission* 546.

As at 31 March 1994: Department of the Parliamentary Library Information Services *Current List of Women Members of Federal and State Parliaments 31 March 1994* Parliament House Canberra, 22.

As at 31 March 1994: id 3, 4.

As at 31 March 1994: id 22.

As at May 1992: Australian Bureau of Statistics *Women In Australia* ABS Canberra 1993, 85, table 7.4.

Ms Rosemary Follett MLA elected in ACT.

Western Australia, Victoria and ACT.

A Seitz & C Kilmartin *Don't Assume the Stereotype: A Pilot Study of Women of Non-English Speaking Background in Melbourne* Department of Immigration and Ethnic Affairs Victoria 1987; R Fincher et al *Gender Equity and Australian Immigration Policy* Bureau of Immigration and Population Research Australian Government Publishing Service Canberra 1994.

See ALRC 67, ch 2 and 3.

Centre Against Sexual Assault, CASA House, Melbourne *Submission* 197.

H Strang *Homicides in Australia 1991-92* Australian Institute of Criminology Canberra 1993, 30.

National Committee on Violence Against Women *National Strategy on Violence Against Women* Office of the Status of Women, Department of Prime Minister and Cabinet Canberra 1992, 2.

A Wallace *Homicide the Social Reality* NSW Bureau of Crime Statistics and Research Sydney 1986, 97; PW Eastal *Killing the Beloved* Australian Institute of Criminology Canberra 1993, 73.

NSW, NT, SA, ACT (data for February 1994), Tasmania and Victoria: P Eastal *Shattered Dreams* (unpublished). 8930 incidents of family violence were reported to the police in Victoria in 1993 blowing out to 13 400 when the Christmas period was included. 850 charges were laid.

23.4%: GL Roberts et al 'Domestic violence and health professionals' (1993) 159 *Medical Journal of Australia* 307, 308. In 1992-93, 3880 women contacted the Supported Accommodation Assistance Program Domestic Violence Services in Victoria. 17% of these women were from non-English speaking background: Supported Accommodation Assistance Program Victoria SAAP *Service Systems Review Victoria: Domestic Violence Services* SAAP Victoria 1994, 2.

N Williams 'Funds plea to fight violence in marriage' *Advertiser* (SA) 22 March 1993, 7.

See S Hatty & J Sutton 'Policing violence against women' in S Hatty (ed) *National Conference on Domestic Violence: Proceedings 11-15 November 1985* Australian Institute of Criminology Canberra 1986.

Domestic Violence Advocacy Service, Sydney *Submission* 148; Bunbury Domestic Violence Action Group WA *Submission* 98; Confidential *Submission* 103; Women's Legal; Resources Centre, Sydney *Submission* 256; Confidential *Submission* 428; Illawarra Legal Centre NSW *Submission* 284. See ch 9.

H Strang *Homicides in Australia 1991-92* Australian Institute of Criminology Canberra 1993, 36.

Law Reform Commission of Victoria *Homicide Prosecutions Study: Appendix to Report No 40* Law Reform Commission of Victoria Melbourne 1991, Table 38, 53; A Wallace *Homicide: The Social Reality* Bureau of Crime Statistics and Research Sydney 1986, 96-7; PW Easta *Killing the Beloved* Australian Institute of Criminology Canberra 1993, 73. See also Confidential *Submission 383*; Waratah Support Centre, Bunbury *Submission 109*.

PW Easta *Killing the Beloved* Australian Institute of Criminology Canberra 1993, 45. Note however that in 34% and 34.5% respectively in the two samples used the ethnicity of the suspect was unknown.

S Payne 'Aboriginal Women and the Criminal Justice System' (1990) 2/46 *Aboriginal Law Bulletin* 9, 10.

Project for Legal Action Against Sexual Assault VIC *Submission 287*.

66.8 victims per thousand women in the population compared to 7.5 victims per thousand men. Overall 90.2% of adult sexual assaults recorded by police between 1989 and 1991 involved female victims: P Salmelainen & C Coumarelos *Adult Sexual Assault in NSW: Crime and Justice Bulletin No 20* Bureau of Crime Statistics and Research Sydney 1993, 6.

id 4.

For example 28.8% in Australian Bureau of Statistics *Crime and Safety Australia April 1993* ABS Sydney 1994, 16; 34% in New South Wales Sexual Assault Committee *Sexual Assault Phone-in Report* Ministry for the Status and Advancement of Women Sydney 1993, 25; 19.6% in PW Easta 'Survivors of sexual assault: a national survey' in PW Easta (ed) *Without Consent: Confronting Adult Sexual Violence: Conference Proceedings* Series No 20 Australian Institute of Criminology Canberra 1993, 81. The latter study found that sexual assault was most likely to be reported if the assailant was a stranger.

K Thickens *Submission 556*; Confidential *Submission 8*; Confidential *Submission 103*; SM Jones *Submission 75*; Centre Against Sexual Assault, Bendigo *Submission 11*; Centre Against Sexual Assault, CASA House, Melbourne *Submission 197*.

Australian Law Reform Commission Discussion Paper 54 *Equality Before the Law* ALRC Sydney 1993, ch 3 (ALRC DP 54).

See the discussion in ALRC DP 54, paras 3.13-3.16.

For a discussion of the controversy surrounding the Sex Discrimination Bill see C Ronalds *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* Second Edition Pluto Press Sydney 1991, 14-18; Sex Discrimination Commissioner *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* AGPS Canberra 1992, para 2.16-2.24.

eg House of Representatives Standing Committee on Legal and Constitutional Affairs *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* AGPS Canberra 1992 (*Half Way to Equal*); Sex Discrimination Commissioner *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984* AGPS Canberra 1992.

eg *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986* (Cth); *Sex Discrimination Amendment Act 1991* (Cth); *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth); *Human Rights and Equal Opportunity Legislation and Other Legislation Amendment Act (No 2) 1992* (Cth); *Industrial Relations and Other Legislation Amendment Act 1993* (Cth); *Law and Justice Legislation Amendment Act 1994* (Cth).

SDA s 5.

SDA s 6.

SDA s 7.

SDA s 14-27.

SDA s 5(1), 6(1) and 7(1).

SDA s 5(2), 6(2) and 7(2). See para 3.11-3.28.

SDA 28A-28L.

SDA s 7A.

The original bill, the Sex Discrimination and Affirmative Action Bill, introduced by Senator Susan Ryan in November 1981 contained both sex discrimination and affirmative action provisions. The Sex Discrimination Bill introduced on 2 June 1983 was modelled on the earlier bill but without the affirmative action provisions: P H Bailey *Human Rights: Australia in an International Context* Butterworths Sydney 1990, 151.

The AAA applies to relevant employers, which are defined as higher education institutions that are employers and private sector employers, whether a natural person or body or association, with 100 or more employees: AAA s 3(1). Employees of Commonwealth authorities are covered under the *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth). See also *Public Service Act 1922* (Cth) s 22B, s 33. The last two Acts deal with equal opportunity for a range of disadvantaged groups, not only women.

See Affirmative Action Agency *Annual Report 1992-1993* AGPS Canberra 1993, para 1.3. Contract compliance was a recommendation of the review: Affirmative Action Agency *Quality and Commitment: The Next Steps: The Final Report of the Review of the Affirmative Action (Equal Employment Opportunity for Women) Act 1986* AGPS Canberra 1992, 101.

Affirmative Action Agency Cth *Submission 349*.

It is important to note that 57% of women employed in the private sector work in enterprises with less than 100 employees: *Half Way to Equal*, para 10.2.30. Additionally reducing the threshold from 100 to 50 would increase the coverage of private sector employees from 45% to 53%, reducing the threshold to 20 would increase the coverage to 67% of private sector employees: Affirmative Action Agency *Quality and Commitment: The Next Steps: The Final Report of the Effectiveness Review of the Affirmative Action (Equal Employment Opportunity for Women) Act 1986* AGPS Canberra 1992, 93.

Affirmative Action Agency *Quality and Commitment: The Next Steps: The Final Report of the Effectiveness Review of the Affirmative Action (Equal Employment Opportunity for Women) Act 1986* AGPS Canberra 1992, 93. These reasons were reiterated by the National Women's Consultative Council 'Submission on Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia': annexed to the National Women's Consultative Council NSW *Submission 342*.

This is considered in the review of the AAA: Affirmative Action Agency *Quality and Commitment: The Next Steps: The Final Report of the Effectiveness Review of the Affirmative Action (Equal Employment Opportunity for Women) Act 1986* AGPS Canberra 1992, 102.

id, 1.

Research conducted by the Affirmative Action Agency indicates that 75% of companies state that the content of their reports is accurate, 12% state that they under report and 13% state that they exaggerate: id, 99.

Affirmative Action Agency Cth *Submission 349*.

Affirmative Action Agency *Quality and Commitment: The Next Steps: The Final Report of the Effectiveness Review of the Affirmative Action (Equal employment Opportunity for Women) Act 1986* AGPS Canberra 1992, 102.

Affirmative Action Agency Cth *Submission 349*. Work on the development of performance standards is to take place in 1993-1994: Affirmative Action Agency *Annual Report 1992-1993* AGPS Canberra 1993, para 2.3.

B Gaze *Submission 267*.

Anti-Discrimination Act 1977 (NSW); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (VIC); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1991* (Qld) and the *Anti-Discrimination Act 1992* (NT). The Tasmanian Government announced that it proposed to introduce sex discrimination legislation in the autumn session: Office of the Status of Women Tasmania *Information Paper: Sex Discrimination Package* OSW Hobart 1994. It was not introduced then and is now hoped to be introduced in the Budget session. The introduction of this Bill is a response to: Tasmanian Women's Consultative Council *Women and Sex*

Discrimination: A Report on the Results of the Statewide Phone-in Conducted by the Tasmanian Women's Consultative Council for the Minister for the Status of Women the Hon Peter Hodgman MHA TWCC Hobart 1994.

eg *Equal Opportunity Act 1984* (WA) proscribes discrimination on the following grounds: sex, marital status and pregnancy, sexual harassment, family responsibility or family status, race, religious and political convictions, impairment and age.

eg the sexual harassment provisions in *Anti-Discrimination Act 1991* (Qld) s 117-120 are the widest and most comprehensive in Australia.

eg *Discrimination Act 1991* (ACT) s 73(2); *Anti-Discrimination Act 1992* (NT) s 74(2).

SDA s 50(1).

SDA s 52.

SDA s 57(1).

SDA s 82A.

SDA s 82B(5). The Court may also grant leave to the respondent to make an application for review after the expiration of the 28 days in 'exceptional circumstances': SDA s 82B(7).

SDA s 82B(1).

Sexual harassment complaints represent 39% of all complaints under the SDA: Sex Discrimination Commissioner HREOC *Sex Discrimination Act 1984: Future Directions and Strategies* AGPS Canberra 1993, 6.

There are also disadvantages for women in the conciliation process: see para 3.92.

These women have generally been employed in a small business and have been forced out as a result of sexual harassment or their refusal to comply with the demands of the harasser: Sex Discrimination Commissioner *Sex Discrimination Act 1984: Future Directions and Strategies* AGPS Canberra 1993, 6. Many of these women have already lost their jobs by the time they make a complaint and are usually no longer in a position to be victimised for doing so. This plays a role in the relative 'freedom' to make a complaint. A submission suggested to the Commission that victimisation and potential negative impact on a career contribute to the lack of use by professional women: Women's Electoral Lobby SA *Submission 537*.

Office of the Status of Women Cth *Submission 543*.

Systemic discrimination is discussed in ALRC DP 54, para 3.26. See M Thornton 'The indirection of sex discrimination' (1993) 12 *University of Tasmania Law Review* 88. See para 3.29-3.30.

Australian Federation of Business & Professional Women Inc *Submission 151*; Legal Aid Office ACT *Submission 294*; Ministry for the Status and Advancement of Women NSW *Submission 350*; Sex Discrimination Commissioner *Submission 338*; H Andrews, Equal Opportunity Commission WA *Submission 363*; Commissioner for Equal Opportunity VIC *Submission 510*; A Scarff *Submission 554*. It is pointed out by M Thornton *Submission 268* that the reliance on this mechanism means that the legislation is unable to deal with systemic nature of harms against women. The limitation of the individual complaints based focus is discussed in more detail at para 3.32. Recommendations are made to widen the powers of the SDC to investigate matters without requiring a complaint: rec 3.3, 3.4, 3.5. This will address some of the concerns in this area.

See *Half Way to Equal*, para 10.1-10.1.124; Sex Discrimination Commissioner *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984* AGPS Canberra 1992.

eg M Thornton *The Liberal Promise: Anti-Discrimination Legislation in Australia* Oxford University Press Melbourne 1990; R Hunter *Indirect Discrimination in the Workplace* Federation Press Sydney 1992.

M Thornton *Submission 268*; Women's Electoral Lobby Australia *Submission 281*.

The term 'positive right' is used to denote a right to be free from discrimination as opposed to a right to take action when discrimination in the proscribed form takes place. Ministry for the Status and Advancement of Women NSW *Submission 350*. See also A Scarff *Submission 554*.

This is currently the subject of consultation: Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993. See M Thornton *Submission 268*; Women's Electoral Lobby Australia *Submission 281*; Sex Discrimination Commissioner *Submission 338*. The complex nature of proving indirect discrimination is also commented upon in terms of WA legislation: H Andrews, Equal Opportunity Commission WA *Submission 363*. See generally R Hunter *Indirect Discrimination in the Workplace* Federation Press Sydney 1992. See para 3.22-3.28.

M Thornton *Submission 268*; Sex Discrimination Commissioner *Submission 338*. See para 3.29-3.48.

M Thornton *Submission 268*. This is reliance on what is termed the 'public/private dichotomy'. The division of public and private activity is seen to establish a division between male and female activity or assumptions about activities, how they are valued and the manner in which the law intervenes. See M Thornton 'The public/private dichotomy: gendered and discriminatory' (1991) 18 *Journal of Law and Society* 448. Australian Federation of Business & Professional Women Inc *Submission 151*; Confidential *Submission 190*; Women Lecturers and Students of the Faculty of Law, University of Tasmania *Submission 258*; Women's Electoral Lobby Australia *Submission 281*; Wesley Central Mission, Melbourne *Submission 299*; Law Institute of Victoria *Submission 335*; Sex Discrimination Commissioner *Submission 338*; Affirmative Action Agency Cth *Submission 349*; Ministry for the Status and Advancement of Women NSW *Submission 350*. See para 3.68-3.89.

J Cradick *Submission 155*; Confidential *Submission 190*; Office of the Status of Women Cth *Submission 543*. There is also the additional problem of the SDA not being used by non-English speaking background women, for a number of reasons: Tasmanian Women's Consultative Council *Submission 534*. See para 3.60-3.67.

Disadvantages are raised by Women Lecturers and Students of the Faculty of Law, University of Tasmania *Submission 258*; Women's Electoral Lobby Australia *Submission 281*. Advantages and disadvantages are discussed in Sisters-in-law *Submission 195*; Confidential *Submission 198*; Ministry for the Status and Advancement of Women NSW *Submission 350*. Advantages are discussed in Confidential *Submission 190*; A Scarff *Submission 554*. Concern over the conciliation process for women who are disadvantaged in other ways such as race or disability were raised in Equal Opportunity Commissioner VIC *Submission 510*. See also M Thornton *The Liberal Promise: Anti-Discrimination Legislation in Australia* Oxford University Press Melbourne 1990, 143-170; M Thornton 'Equivocations of conciliation: the resolution of discrimination complaints in Australia' (1989) 52 *Modern Law Review* 733. See para 3.90-3.94.

Confidential *Submission 190*; Confidential *Submission 198*; Australian Federation of Business & Professional Women Inc *Submission 251*; Anti-Discrimination Commissioner QLD *Submission 337*; Tasmanian Gay & Lesbian Rights Group *Submission 280*. See para 3.100-3.104.

Sex Discrimination Commissioner *Submission 338*; Equal Opportunity Commissioner VIC *Submission 510*; H Andrews, Equal Opportunity Commission WA *Submission 363*.

House of Representatives Standing Committee on Legal and Constitutional Affairs *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* AGPS Canberra 1992.

'Phase one' implementation dealt with *Half Way to Equal*, rec 65, 66(b) 67, 75 and provided the SDC with power to receive complaints about discrimination in industrial awards and refer the matters to the Australian Industrial Relations Tribunal: *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth) and the *Human Rights and Equal Opportunity Legislation and Other Legislation Amendment Act (No 2) 1992* (Cth). See Attorney-General's Department Cth *Submission 607*.

Known as the 'phase two' implementation: Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993. This discussion paper considers options for the implementation of recommendations 60(a), 60(b), 64, 70 and 72; Human Rights Branch, Attorney-General's Department, Legislation Working Group on the ILO 156 Interdepartmental Committee *Workers*

with *Family Responsibilities: Discrimination Legislation: An Issues Paper* Attorney-General's Department Canberra 1993. This discussion paper considers recommendations 62 and 63.

170 Australian Government *Government Response to Half Way to Equal: The Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia by the House of Representatives Standing Committee on Legal and Constitutional Affairs* AGPS Canberra 1992.

171 Sex Discrimination Commissioner *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* AGPS Canberra 1992.

172 SDA s 13.

173 SDA s 38.

174 SDA s 39.

175 SDA s 40. The review deferred consideration of the exemption provided for the *Social Security Act 1991* (Cth): Sex Discrimination Commissioner HREOC *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* AGPS Canberra 1992, para 1.37-1.41.

176 SDA s 42.

177 SDA s 40(1)(e) was partially removed in that awards made after the *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth) came into effect, on 13 January 1993, are subject to the SDA.

178 Attorney-General's Department Cth *Submission 607*.

179 Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993. See also Attorney-General's Department Cth *Submission 607*. The submission also discusses the proposed amendment to the exemption for combat-related duties, which is to be confined to combat duties only and the provision of additional resources to the SDC which was announced in the 1993-94 Budget. See Australia Government *Women's Budget Statement 1993-94* Budget Related Paper No 4 AGPS Canberra, 52-53.

180 *Half Way to Equal*, rec 60(a) and 60(b). See para 3.14-3.21.

181 id, rec 70. See para 3.22-3.28.

182 id, rec 72. See para 3.52-3.59.

183 id, rec 64. See para 3.49-3.51.

184 Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 1-7. See also ALRC DP 54, para 4.20; *Half Way to Equal*, para 10.1.41-10.1.42.

185 RDA s 9(1).

186 Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 7.

187 eg Ministry for the Status and Advancement of Women NSW *Submission 350*; Office of the Status of Women Cth *Submission 543*; Sisters-in-Law *Submission 195*; The Affirmative Action Agency Cth *Submission 349* supports the recommendations made in *Half Way to Equal*.

188 CEDAW art 1. It is in similar terms to International Convention on the Elimination of All Forms of Racial Discrimination (CERD) art 1(1) on which RDA s 9(1) relies.

189 SDA s 81.

190 RDA s 9(2).

191 ALRC DP 54, para 4.5. See also id, question 4.1.

192 Submissions discussed the possibility of a general Bill of Rights, a constitutional guarantee of equality and statutory protection of equality. See A J Kenos *Submission 76*; Women of Far North Queensland *Submission 117*; M Flynn *Submission 145*; Confidential *Submission 190*; Sisters-in-Law *Submission 195*; Children by Choice Association QLD *Submission 208*; M Thornton *Submission 268*; Tasmanian Gay & Lesbian Rights Group *Submission 280*; Wesley Central Mission, Melbourne *Submission 299*; Women's Electoral Lobby VIC *Submission 307*; Anti-Discrimination Commissioner QLD *Submission 337*; Sex Discrimination Commissioner *Submission 338*; J Blokland *Submission 347*; Ministry for the Status and Advancement of Women NSW *Submission 350*; Commissioner for Equal Opportunity VIC *Submission 510*; Office of the Status of Women Cth *Submission 543*.

193 eg Community Legal & Advocacy Centre, Fremantle *Submission 6*; Confidential *Submission 78*; Sisters-in-Law *Submission 195*; Confidential *Submission 201*; J Doust *Submission 213*; Women's Electoral Lobby VIC *Submission 307*; Anti-Discrimination Commissioner QLD *Submission 337*; Sex Discrimination Commissioner *Submission 338*; D McCulloch, K Conley, M Martinelli, M Mati, R Walsh *Submission 537*.

194 Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 8-9; *Half Way to Equal*, rec 60(b).

195 CEDAW art 15(1); ICCPR art 26.

196 SDA s 12, 13 and 40. Exemptions are discussed in para 3.68-3.89.

197 eg *Koowarta v Bjelke-Petersen & Ors* (1982) 153 CLR 168; *Gerhardy v Brown* (1985) 159 CLR 70; *Mabo v Queensland & Anor* (1988) 166 CLR 186.

198 This simple definition does not reflect the complex criteria that must be established under the current SDA provisions relating to indirect discrimination for a complaint to be successful: SDA s 5(2), 6(2) and 7(2).

199 Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 11.

200 eg Women's Electoral Lobby Australia *Submission 281*; M Thornton *Submission 268*; Sex Discrimination Commissioner *Submission 338*.

201 New South Wales Law Reform Commission Discussion Paper 30 *Review of the Anti-Discrimination Act 1977 (NSW)* NSWLRC Sydney 1993, para 3.62.

202 Some of these reasons are listed in Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 12-13.

203 SDA s 5(2), 6(2), 7(2).

204 eg M Thornton *Submission 268*; Sex Discrimination Commissioner *Submission 338*; Ministry for the Status and Advancement of Women NSW *Submission 350*; H Andrews, Equal Opportunity Commission WA *Submission 363*.

205 Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 16.

206 id, 17.

207 ibid. The paper makes reference to the provisions relating to indirect discrimination in the *Anti-Discrimination Act 1991* (ACT) and the *Anti-Discrimination Act 1991* (Qld).

208 id, 18-19. This will be discussed in para 3.36-3.40 in relation to systemic discrimination although such a proposal has implications for the investigation of all three types of discrimination. The Commission sees the widening of the powers of the SDC as important to the future effectiveness of the Act.

209 id, 17. Identified as option one.

210 eg M Thornton *Submission 268*; Ministry for the Status and Advancement of Women NSW *Submission 350*. This would require the replacement of SDA s 5(2)(b), 6(2)(b), 7(2)(b).

211 Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 17.

212 Britain, USA, Canada, and the European Union.

213 *Anti-Discrimination Act 1991* (Qld) s 205.

R Hunter *Indirect Discrimination in the Workplace* Federation Press Sydney 1992, 42.

Discrimination Act 1991 (ACT) s 8(1)(b). The ACT provides for a wider list of attributes in s 7(1) on the basis of which discrimination is unlawful.

Discrimination Act 1991 (ACT) s 8.

R Hunter *Indirect Discrimination in the Workplace* Federation Press Sydney 1992, 240, although R Hunter comments that 'the onus would probably would fall on the [respondent]'.

Discrimination Act 1991 (ACT) s 8(3).

The 'least discriminatory option' requirement also provides the complainant with an argument that the respondent had other options to pursue.

R Hunter *Indirect Discrimination in the Workplace* Federation Press Sydney 1992, 13.

Public Service Alliance of Canada and Canadian Human Rights Commission v Canada (Treasury Board) (1991) 14(5) Canadian Human Rights Reporter D/341, D/349.

Ministry for the Status and Advancement of Women NSW *Submission 350*.

Association of Non-English Speaking Background Women of Australia, prepared by C Keating, Effective Change Consultants *Race and Sex Discrimination in Employment and Training Policy Paper 3* ANESBWA Granville 1994, 15. See discussion on multiple forms of disadvantage and ways in which to combat them in para 3.60-3.67.

R Hunter *Indirect Discrimination in the Workplace* Federation Press Sydney 1992, 14.

CEDAW art 2(c). Emphasis added. See also CEDAW art 2(f).

Equal Opportunity Commissioner VIC *Submission 510*. M Rayner began the investigation in April 1991, it was referred to her by the Equal Opportunity Board under *Equal Opportunity Act 1984* (VIC) s 41.

Although the situation of women in other prisons in Victoria was also examined: Equal Opportunity Commissioner VIC *Submission 510*.

Of particular significance to the Commissioner were two events that had taken place. First, new restrictive access conditions were imposed on all prisoners, yet women are generally not of the same escape risk or danger to the community. As a result a number of women refused to have their children visit because they did not want them to be strip searched. Second, the Government proposed to close Fairlea prison, the only metropolitan women's prison, and move all women to Jika Jika men's prison: Equal Opportunity Commissioner VIC *Submission 510*.

Equal Opportunity Commissioner VIC *Submission 510*. Recent amendments to the Victorian Act have removed the position of Equal Opportunity Commissioner: *Equal Opportunity (Amendment) Act 1993* (Vic) s 5. These amendments commenced on 1 March 1994.

See para 3.14-3.17, rec 3.1.

ibid.

eg Australian Federation of Business & Professional Women Inc *Submission 151*; M Thornton *Submission 268*; Anti-Discrimination Commissioner QLD *Submission 337*; Sex Discrimination Commissioner *Submission 338*; Office of the Status of Women Cth *Submission 543*.

Sex Discrimination Commissioner *Submission 338*. See also Office of the Status of Women Cth *Submission 543*.

ALRC DP 54, question 4.12.

SDA s 49(1) provides that the SDC's functions are those functions of HREOC provided in sections 48(1)(a), (ca) and (h).

SDA s 51(a). The Minister has a power to refer a matter to the Commission for inquiry, in such a case the SDC is deemed to be the complainant: SDA s 58. HREOC has a power to refer a matter that appears to be unlawful under the SDA to the Commissioner to conduct an inquiry: SDA s 52(1)(b). These powers have never been used: Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 6.31-6.32.

SDA s 51(d).

Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 6.33.

R Hunter *Indirect Discrimination in the Workplace* Federation Press Sydney 1992, 258-259.

eg Women's Electoral Lobby Australia *Submission 281*; Sex Discrimination Commissioner *Submission 338*; Ministry for the Status and Advancement of Women NSW *Submission 350*; H Andrews, Equal Opportunity Commission WA *Submission 363*; Tasmanian Gay & Lesbian Rights Group *Submission 280*; Office of the Status of Women Cth *Submission 543*. The widening of the SDC's powers was also considered in Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 18-19.

eg similar powers are available to Commissioners under *Discrimination Act 1991* (ACT) s 73(2); *Anti-Discrimination Act 1992* (NT) s 74(2). See also Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 18-19.

Disability Discrimination Act 1992 (Cth) s 31. It is suggested that a useful model may be the *Americans with Disabilities Act 1990*: Disability Discrimination Commissioner, for the DDA Disability Standards Working Group *Issues Paper: Disability Standards under the Disability Discrimination Act* HREOC Sydney 1993, 12-15.

Privacy Act 1988 (Cth) s 30. See Office of the Status of Women Cth *Submission 543*.

Discrimination Act 1991 (ACT) s 73(2). See also *Anti-Discrimination Act 1992* (NT) s 74(2) which provides that the Commissioner may carry out an investigation if during the performance of her or his functions it appears that prohibited conduct has occurred.

Privacy Act 1988 (Cth) s 40(2).

eg *Anti-Discrimination Act 1992* (NT) s 74(2).

A matter which appears to be unlawful would be an act, practice or policy which may contravene SDA Part II.

Law Reform Commission of Victoria Report No 36 *Review of the Equal Opportunity Act* (VLRC 36) VLRC Melbourne 1990, para 170. This comment was made in relation to the situation that was the case under the *Equal Opportunity Act 1984* (VIC) which required the Commissioner to seek consent from the Attorney General. The VLRC review of *Equal Opportunity Act 1984* (VIC) recommended the removal of this requirement. See the proposed Draft Equal Opportunity Bill cl 430: id, 141. The *Equal Opportunity (Amendment) Act 1993* (VIC) s 11 amended these sections and substituted the term 'Commission' for 'Commissioner', consent is still required from the Minister to conduct such an investigation. The position of Commissioner was removed by that amendment Act.

Over the period 1 July 1992 to 30 June 1993, 50.13% of complaints received by HREOC were lodged under the SDA: Human Rights and Equal Opportunity Commission *Annual Report 1992-1993* AGPS Canberra 1993, table 1, 241. This figure does not include complaints lodged under the *Anti-Discrimination Act 1991* (QLD) and the *Discrimination Act 1991* (ACT) whose figures are also included in this table.

SDA s 54.

SDA s 55.

SDA s 56(1).

Law Reform Commission of Victoria Report No 36 *Review of the Equal Opportunity Act* VLRC Melbourne 1990, draft Equal Opportunity Bill cl 430.2, 141.

Privacy Act 1988 (Cth) s 30(1)(b)(ii). See also Law Reform Commission of Victoria Report No 36 *Review of the Equal Opportunity Act* VLRC Melbourne 1990, draft Equal Opportunity Bill cl 430.3, 141.

See Model #1 and #2 confidential assessment and developing recommendations in Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 6.71-6.72.

This section provides: 'The Commissioner may, of his or her own motion, investigate conduct that appears to be unlawful under Part III, V, VII or section 66'.

DDA s 31. Employment, education, accommodation, provision of public transportation services and facilities, and the administration of Commonwealth laws and programs: DDA s 31(1).

The DDA Disability Standards Working Group has proposed a timetable for consultation and the drafting of standards: Disability Discrimination Commissioner, for the DDA Disability Standards Working Group *Issues Paper: Disability Standards under the Disability Discrimination Act* HREOC Sydney 1993, 18-19.

DDA s 67(1)(d).

DDA s 31(2)-31(4) establishes the procedure by which the standards may be amended and approved by the Houses of Parliament.

DDA s 32.

DDA s 33.

DDA s 69(1).

M C Tyler 'The Disability Discrimination Act 1992: Genesis, drafting and prospects' (1993) 19 *Melbourne University Law Review* 211, 221.

Human Rights and Equal Opportunity Commission *Annual Report 1992-1993* AGPS Canberra 1993, 67.

It is said that the DDA standard setting function 'cast[s] a positive role on employers': C Ronalds quoted in M C Tyler 'The Disability Discrimination Act 1992: Genesis, drafting and prospects' (1993) 19 *Melbourne University Law Review* 211, 221-222.

For a discussion of the role of standards see Disability Discrimination Commissioner, for the DDA Disability Standards Working Group *Issues Paper: Disability Standards under the Disability Discrimination Act* HREOC Sydney 1993, 8-9.

These are listed as issues which could be considered in dealing with repeat respondents under the SDA: Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 6.41-6.65.

SDA s 3.

Privacy Act 1988 (Cth) s 40(2).

Privacy Act 1988 (Cth) s 30 (1)(b)(ii).

A report must be made either when the Commissioner is directed to do so by the Minister: *Privacy Act 1988* (Cth) s 30 (1)(a); or if the Commissioner thinks that the act or practice has interfered with privacy and that the matter is not appropriate to conciliate: s 30(1)(b).

Privacy Act 1988 (Cth) s 30(3). These powers are in reference to specific types of investigations [under s 27(1)(a), 28(1)(b), s 28(1)(c) or 28A (1)(b)] of specific organisations or agencies, ie they apply to an agency, file number recipient, credit reporting agency or credit provider. These are given specific meanings under the Act.

Privacy Act 1988 (Cth) s 30(5).

G Tucker *Information Privacy Law in Australia* Longman Professional Melbourne 1992, 123.

Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 6.74.

HREOCA s 46.

Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 6.74.

Boehringer Ingelheim Pty Ltd v Reddrop (1984) EOC #92-108; *Waterhouse v Bell* (1991) EOC #92-376.

These examples are used in Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 22.

Boehringer Ingelheim Pty Ltd v Reddrop (1984) EOC #92-108.

Waterhouse v Bell (1991) EOC #92-376.

Confidential *Submission 3*; Women's Electoral Lobby Australia *Submission 281*.

Confidential *Submission 3*.

Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 24.

Half Way to Equal, rec 64. See the discussion of this recommendation in Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 21-25.

SDA s 33.

eg Women's Electoral Lobby Australia *Submission 281*; Sex Discrimination Commissioner *Submission 338*; Office of the Status of Women Cth *Submission 543*.

Sex Discrimination Commissioner *Submission 338*.

Endeavour Forum South West Region *Submission 147*; Queensland Law Society Inc *Submission 324*.

Endeavour Forum South West Region *Submission 147*.

Queensland Law Society Inc *Submission 324*.

SDA s 33.

J Doust *Submission 213* commenting on the outcome in *City of Brunswick; Re Application for Exemption from Provisions of EEO Act 1984* (Vic) (1992) EOC #92-450.

Office of the Status of Women Cth *Submission 543*.

Confidential *Submission 198*.

CEDAW art 4(1).

For a discussion of this contrast between the SDA and CEDAW see R Leon 'W(h)ither special measures? How affirmative action for women can survive sex discrimination legislation' (1993) 1 *The Australian Feminist Law Journal* 89, 92-93.

Half Way to Equal, para 10.1.123.

Attorney-General *Proposals to Amend the Sex Discrimination Act 1984* Attorney-General's Department Canberra 1993, 28-30. For expansive interpretations of the provision see *Municipal Officers' Association of Australia & Anor; Approval of Submission of Amalgamation to Ballot* (1991) EOC #92-344; *Proudfoot & Ors v Australian Capital Territory Board of Health & Ors* (1992) EOC #92-417. For a restrictive approach see *Re Australian Journalists Association, in the matter of an appeal* (1988) EOC #92-224.

Constitutional Commission *Final Report of the Constitutional Commission* Vol 1 AGPS Canberra 1988, para 9.487.

Ontario Law Reform Commission, by C Sheppard, *Study Paper on Litigating the Relationship Between Equity and Equality* OLRC Toronto 1993.

Constitution Act 1982 (Canada) s 15(1) and s 15(2). These provisions are discussed in ALRC DP 54, para 4.10.

Ontario Law Reform Commission, by C Sheppard *Study Paper on Litigating the Relationship Between Equity and Equality* OLRC Toronto 1993, 2.

SDA s 32.

CEDAW art 4(2).
 SDA s 52A, 52B.
 ALRC DP 54, para 2.3.
 eg Women of Far North Queensland *Submission 117*; Menstrual Management Research Team, Department of Social Work and Social Policy, University of Queensland *Submission 185*; Centre Against Sexual Assault, CASA House, Melbourne *Submission 197*; NSW Sub-Committee on Sexual Assault and People with an Intellectual Disability *Submission 250*; S Goiser *Submission 273*; Illawarra Legal Centre *Submission 284*; Domestic Violence Legal Help, Darwin *Submission 306*; Migrant Women's Emergency Service QLD *Submission 388*; Domestic Violence Action Group, Port Lincoln *Submission 453*.
 eg Older Women's Network Canberra *Submission 93*; Older Women's Network Australia Inc, Sydney *Submission 303*; Older Women's Network TAS *Submission 304*; National Children's and Youth Law Centre *Submission 312*.
 eg Australian Federation of Business & Professional Women Inc *Submission 151*; J Cradick *Submission 155*; Confidential *Submission 190*; Office of the Status of Women Cth *Submission 543*.
 N Duclos 'Disappearing women: racial minority women in human rights cases' (1993) 6 *Canadian Journal of Women and the Law* 25, 39.
 In order to address the lack of use of the SDA by indigenous women the SDC is sponsoring a project in far north Queensland to raise the awareness of indigenous women of their rights under the Act. Since the DDA only commenced in 1993 it is too early to assess women's use of it.
 Ministry for the Status and Advancement of Women NSW *Submission 350*. This is also commented upon in L Blakey & K Budrikis 'A woman's place: interview: Sue Walpole' (1993) 4 *Polemic* 28, 28.
 Of the 370 complaints lodged under the RDA over the period 1992-1993, 222 (60%) were lodged by men while only 140 (38%) were lodged by women and 8 (2%) were lodged by groups or organisations: Human Rights and Equal Opportunity Commission *Annual Report 1992-1993* AGPS Canberra 1993, table 10, 253.
 The State and Territory anti-discrimination legislation takes a different approach. Each has only one Act which deals with discrimination on a large number of grounds.
 Although HREOCA has broader coverage the remedies available under that Act are so limited that those alleging discrimination complain under another Act if they are able to do so.
 The RDA implements part of Australia's obligations under CERD; the SDA implements part of Australia's obligations under CEDAW; the DDA implements obligations under the Declaration of the Rights of Disabled Persons, the Declaration on the Rights of the Child and ILO Convention 159 (Vocational Rehabilitation and Employment: Disabled Persons).
 N Duclos 'Disappearing women: racial minority women in human rights cases' (1993) 6 *Canadian Journal of Women and the Law* 25, 44.
 S Razack *Canadian Feminism and the Law: the Women's Legal Education and Action Fund and the Pursuit of Equality* Second Story Press Toronto 1991, 133.
 J Cradick *Submission 155*.
 S Razack *Canadian Feminism and the Law: the Women's Legal Education and Action Fund and the Pursuit of Equality* Second Story Press Toronto 1991, 133.
 N Duclos 'Disappearing women: racial minority women in human rights cases' (1993) 6 *Canadian Journal of Women and the Law* 25.
 N Duclos 'Disappearing women: racial minority women in human rights cases' (1993) 6 *Canadian Journal of Women and the Law* 25, found that racial minority women simply disappeared from the reported cases. It is also important to note that whether a woman is disabled, older, younger and/or lesbian also impacts on the experience and nature of sex discrimination. These factors are also generally absent from the case law.
Degraffenreid v General Motors (1976) 413 F Supp 142. See discussion of this case in P R Smith 'Separate identities: Black women, work and Title VII' (1991) 14 *Harvard Women's Law Journal* 21, 30-34; J Cradick *Submission 155*.
Moore v Hughes Helicopter Inc (9th Circuit 1983) 708 F 2d 475; *Payne et al v Travenol Laboratories Inc* (5th Circuit 1982) 673 F 2d 798. See also K Crenshaw 'Demarginalising the intersection of race and sex: a Black feminist critique of anti-discrimination doctrine, feminist theory and antiracist politics' (1989) *University of Chicago Legal Forum* 139.
 Association of Non-English Speaking Background Women of Australia, prepared by C Keating, Effective Change Consultants *Race and Sex Discrimination in Employment and Training Policy Paper 3* ANESBWA Granville 1994, 16.
 id, 21.
 id, 1.
 id, rec 7.
 id, rec 11.
 id, rec 1.
 Confidential *Submission 190*. This reflects the view in Canada: Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action* Department of Justice April 1992, 5.
 This approach must not be confused with the approach that has been identified as 'sex-plus', which refers to attributes which when combined with sex result in the woman or man being discriminated against. The plus factor is generally a factor which is not proscribed in law, such as having young children. This approach has been applied in the United States. It has been argued that this is not appropriate as neither race nor sex can be considered as plus factors to a central experience: P R Smith 'Separate identities: Black women, work and Title VII' (1991) 14 *Harvard Women's Law Journal* 21, 40-49.
Fares v Box Hill College of TAFE & Ors (1992) EOC #92-391.
Fares v Box Hill College of TAFE & Ors (1992) EOC #92-391, 78,782.
 Options one and two were discussed by J Cradick *Submission 155*.
 As evidenced in N Duclos 'Disappearing women: racial minority women in human rights cases' (1993) 6 *Canadian Journal of Women and the Law* 25. The approach taken in *Fares v Box Hill College of TAFE & Ors* (1992) EOC #92-391 suggests that it is possible and can be highly effective.
 Although it has been suggested that the conciliator will 'attempt to tease out' with the complainant the complaint which is most likely to succeed: Association of Non-English Speaking Background Women of Australia, prepared by C Keating, Effective Change Consultants *Race and Sex Discrimination in Employment and Training Policy Paper 3* ANESBWA Granville 1994, 21.
 P R Smith 'Separate identities: Black women, work and Title VII' (1991) 14 *Harvard Women's Law Journal* 21, 23. This article focuses on the experience of Black women as distinct from white women, Black men or white men.
 Sex Discrimination Commissioner *Submission 338* states, 'Women are prevented from using the SDA to tackle discrimination in many areas of public life, because the exemptions make it lawful for discrimination to exist in specific areas'.
 Sex Discrimination Commissioner HREOC *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984* AGPS Canberra 1992, para 2.55-2.57.

ALRC DP 54, para 4.23; Sex Discrimination Commissioner HREOC *Sex Discrimination Act 1984: Future Directions and Strategies* AGPS Canberra 1993, 5. Submissions also made this point: eg Sex Discrimination Commissioner *Submission 338*; Affirmative Action Agency Cth *Submission 349*; Confidential *Submission 190*.

Confidential *Submission 190*.

SDA s 12.

SDA s 13.

SDA s 30.

SDA s 31.

SDA s 32.

SDA s 33.

SDA s 34.

SDA s 35.

SDA s 36.

SDA s 37.

SDA s 38.

SDA s 39.

SDA s 40.

SDA s 41.

SDA s 41A, 41B. The exemption has been amended in relation to new superannuation funds.

SDA s 42.

SDA s 43.

ALRC DP 54, question 4.7.

eg Australian Federation of Business & Professional Women Inc *Submission 151*; Wesley Central Mission, Melbourne *Submission 299*; Ministry for the Status and Advancement of Women NSW *Submission 350*. A number of submissions stated that all exemptions should be removed with the exception of the ones relating to special measures contained in SDA s 32 & 33: eg Women's Electoral Lobby Australia *Submission 281*; Anti-Discrimination Commissioner QLD *Submission 337*; Sex Discrimination Commissioner *Submission 338*; Affirmative Action Agency Cth *Submission 349*. A number of submissions argued for the removal of specific exemptions, eg Independent Teachers' Federation of Australia *Submission 7* supported the removal of SDA s 38; Law Institute of Victoria *Submission 335* supported the removal of SDA s 40(2) particularly in relation to income tax and social security.

eg Confidential *Submission 190*; H Katzen *Submission 215*; Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322*.

Endeavour Forum South West Region *Submission 147*.

The Commission received submissions which discussed this concern: H Katzen *Submission 215*; Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322*.

With the exception of the exemption relating to special measures: SDA s 32 and 33.

Sex Discrimination Commissioner HREOC *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* AGPS Canberra 1992.

This exemption was also considered in *Half Way to Equal* which recommended the addition of a requirement of reasonableness to the exercise of this exemption: rec 73.

The SDC deferred consideration of the exemption provided to the *Social Security Act 1991* (Cth): Sex Discrimination Commissioner *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* AGPS Canberra 1992, para 1.37-1.41. This exemption will be the second stage to this review, furthermore the SDA s 40A provides that a review of the exemptions in s 40(2) and(3) must be conducted by 1 June 1996.

id, para 6.64; *Half Way to Equal*, rec 74.

Office of the Status of Women Cth *Submission 543* states that the Government intends to consider the Sex Discrimination Commissioner *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* AGPS Canberra 1992, early in 1994 and recommends that the 'Attorney-General implement the recommendations . . . as soon as possible'.

Attorney-General's Department Cth *Submission 607*.

Sex Discrimination Commissioner *Submission 338*; Ministry for the Status and Advancement of Women NSW *Submission 350*. The Independent Teachers' Federation of Australia *Submission 7* supported the recommendation made by the SDC in relation to SDA s 38.

SDA s 13.

Confidential *Submission 190*; Sex Discrimination Commission *Submission 338*; J Blokland *Submission 347*.

Sex Discrimination Commissioner *Submission 338*; Tasmanian Women's Consultative Council *Submission 534*. See also: Tasmanian Women's Consultative Council *Women and Sex Discrimination: A Report on the Results of the Statewide Phone-in conducted by the Tasmanian Women's Consultative Council for the Minister for the Status of Women The Hon. Peter Hodgman MHA TWCC Hobart 1994*.

Tasmanian Women's Consultative Council *Submission 534*.

Sex Discrimination Commissioner *Submission 338*.

Initially it was hoped to be introduced in the Autumn session of parliament, but is now intended to be introduced in the Budget session. The Bill is intended to cover discrimination on the ground of gender, marital status, pregnancy, parental status, family responsibility and sexual harassment in the areas of employment, education, provision of goods, services and facilities, accommodation, clubs and the administration of State laws and programs and application forms: Office of the Status of Women TAS *Information Paper: Sex Discrimination Package OSW Hobart 1994*.

eg Sex Discrimination Commissioner *Submission 338*; J Blokland *Submission 347*; Tasmanian Women's Consultative Council *Submission 534*.

J Blokland *Submission 347*.

SDA s 38.

Independent Teachers' Federation of Australia *Submission 7*; Confidential *Submission 190*; Sex Discrimination Commissioner *Submission 338*; Affirmative Action Agency Cth *Submission 349*.

For a discussion of these differences see Sex Discrimination Commissioner HREOC *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* AGPS Canberra 1992, para 4.15-4.24.

Attorney-General's Department Cth *Submission 607*.

ICCPR art 18.

Evidence from the Seventh-Day Adventist Church, National Catholic Education Commission and the Australian Association of Christian Schools to *Half Way to Equal*, para 10.1.95.

Sex Discrimination Commissioner HREOC *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* AGPS Canberra 1992, para 4.61, 4.64.

id, para 4.62.

The Australian Catholic Bishops Conference submission referred to in: id, para 4.60.

id, para 4.75.

'Independent Teachers' Federation of Australia *Submission 7*; L Wright, Women's Officer Independent Teachers' Federation *Submission 570*. The Independent Teachers' Federation of Australia is now known as the Independent Teachers' Federation.

Independent Teachers' Federation of Australia *Submission 7*.

L Wright, Women's Officer Independent Teachers Federation *Submission 570*. See also submission by the Women's Advisory Council to *Half Way to Equal*, para 10.1.96 which commented that women employed in non-government schools are not accorded the same right to equality as women employed in non-religious or public institutions.

In 1993 non-government schools employed 70 412 persons (teaching and non-teaching) of a total of 251 483 employed in schools in Australia. This represents 28% of staff employed in schools. In terms of teaching staff 55 274 are employed in non-government schools of a total of 201 911 teaching staff in Australia. This represents 27.38% of teaching staff, of whom 63.66% are women: Australian Bureau of Statistics *Schools, Australia 1993*, Preliminary ABS Catalogue No 4220.0, table 5, 7.

ibid.

See submission by the Independent Teachers' Federation of Australia to House of Representatives Standing Committee on Legal and Constitutional Affairs *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* AGPS Canberra 1992, para 10.1.94.

Affirmative Action Agency *Annual Report 1992-1993* AGPS Canberra 1993, para 1.3.

Affirmative Action Agency Cth *Submission 349*.

Half Way to Equal, rec 73.

id, para 10.3.20.

Sex Discrimination Commissioner HREOC *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* AGPS Canberra 1992, para 4.76.

id, para 4.77.

ICCPR art 18.

ICCPR art 27.

The need to balance potentially conflicting rights was discussed in Australian Law Reform Commission Report 57 *Multiculturalism and the Law* ALRC Sydney 1992, para 7.3. The manifestation of religion may be limited if this is necessary to protect other rights, including the right to equality and non-discrimination: ICCPR art 18(3); General Comment No 22 (48th Session) of the Human Rights Committee on ICCPR art 18, para 8.

Evidence of the Women's Advisory Council to *Half Way to Equal*, para 10.1.96.

Currently women are eligible for the age pension at 60 years and men are eligible at 65 years of age. This disparity is to be removed gradually over a twenty-year period: Australia. Government *Women's Budget Statement 1993-94* Budget Related Paper No 4 AGPS Canberra 1993, 230.

It has been proposed to phase out this pension in July 1995: Australia. Government *Working Nation: Policies and Programs* AGPS Canberra 1994, 148.

The government has proposed a parenting allowance that will be available to all single income families. It is to complement existing family payments and is seen as a means of increasing the choice of parents to balance work and family responsibilities: Australia. Government *Working Nation: The White Paper on Employment and Growth* AGPS Canberra 1994, 15.

H Katzen *Submission 215*; Federation of Community Legal Centres Inc VIC *Submission 322*.

SSA s 4(3).

Australian Government *Women's Budget Statement 1993-94* Budget Related Paper No 4 AGPS Canberra 1993, 241. This figure has increased from 270 800 in June 1992 to 280 900 in June 1993.

H Katzen *Submission 215*; Federation of Community Legal Centres Inc VIC *Submission 322*. See also Townsville Community Legal Service Inc *Submission 493* which discusses the experiences of women under the SSA and in dealings with the DSS which amount to discriminatory treatment.

Sex Discrimination Commissioner *Submission 338*.

Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322*.

H Katzen *Submission 215*; Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322*.

Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322*.

eg different age eligibility for the age pension was discussed in Confidential *Submission 136* which pointed to the possible negative implications for women in the increase in pension age eligibility without compensation for the discrimination older women face in gaining employment and the expectation placed on them to care for others.

H Katzen *Submission 215*; Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322*.

Social Security Working Group, Federation of Community Legal Centres Inc VIC *Submission 322*.

SDA s 40A.

SDA s 39.

SDA s 40.

SDA s 42.

SDA s 4. This does not include clubs, registered organisations, a body established by a law of the Commonwealth, or a State or Territory or an association that provides grants, loans, credit or finance to its members.

Sex Discrimination Commissioner *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* AGPS Canberra 1992, para 5.38.

id, para 7.44.

id, para 5.39.

id, para 7.44.

id, para 7.45.

id, para 6.62.

id, para 6.63.

Half Way to Equal, rec 74.

Association of Non-English Speaking Background Women of Australia, prepared by C Keating, Effective Change Consultants *Race and Sex Discrimination in Employment and Training* Policy Paper 3 ANESBWA Granville 1994, 20-21, discusses the difficulties faced by NESB women; Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 5.55, points out the difficulties faced by Aboriginal women and NESB women.

For an outline of methodology and nature of this review see Sex Discrimination Commissioner HREOC *Sex Discrimination Act 1984: Future Directions and Strategies* AGPS Canberra 1993, 69-71.

See para 3.61.

Sex Discrimination Commissioner *Submission 338*. The SDC states that this issue is to be addressed in the Complaints Handling Review. Office of the Status of Women Cth *Submission 543*.

DDA s 69(2).

The SDC had assisted the complainant by typing her hand written complaint. Some details of the complaint had been amended, however the complaint was substantially the same: *B v Russell Matthews* (1991). See discussion of this case in Sex Discrimination Commissioner *Sex Discrimination Act 1984: Future Directions and Strategies* AGPS Canberra 1993, 11-14.

A similar provision should also be inserted in the RDA.

Disadvantages are raised by Women Lecturers and Students of the Faculty of Law, University of Tasmania *Submission 258*; Women's Electoral Lobby Australia *Submission 281*. Advantages and disadvantages are discussed in Sisters-in-law *Submission 195*; Confidential *Submission 198*; Ministry for the Status and Advancement of Women NSW *Submission 350*. Advantages are discussed in Confidential *Submission 190*; A Scarff *Submission 554*.

See ALRC 67.

Sex Discrimination Commissioner *Submission 338*.

Ministry for the Status and Advancement of Women NSW *Submission 350*.

Confidential *Submission 198*.

Confidential *Submission 198*.

Ministry for the Status and Advancement of Women NSW *Submission 350*.

Confidential *Submission 198*.

In the last financial year 34% of complaints under the SDA were dropped by complainants: Sex Discrimination Commissioner *Submission 338*.

C Ronalds *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* Second Edition Pluto Press Sydney 1991, 197.

Sex Discrimination Commissioner *Submission 338*.

A repeat respondent (known as a recidivist) is a person who infringes the provisions of the SDA on more than one occasion.

The ability of the SDC to monitor the outcome of complaints may go some way in addressing this recidivism. In monitoring the outcome of a complaint in which discrimination is continuing the SDC will need to consider the issue of action/enforcement of the determination. See discussion in Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 6.24-6.40.

Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 6.5. It is significant to note that of the large employers it is only the public sector employers that are repeat respondents, there are no large private sector employers appearing as repeat respondents. There are a number of possible reasons for this, including the work culture of making complaints and the availability of internal complaint resolution mechanisms: id, para 6.6.

Sex Discrimination Commissioner *Submission 338*.

The difficulty in dealing effectively with repeat respondents to change their practices would also be addressed to some extent through the recommendations to extend the SDC's powers to investigate systemic discrimination on her own initiative, the setting of standards and the making of reports to the Minister: see para 3.29-3.48.

Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 6.4. See also Anti-Discrimination Commissioner QLD *Submission 337*.

SDA s 57(1)(c).

ALRC *Consultation S* Walpole, Sex Discrimination Commissioner 10 December 1993. A similar comment was made in relation to the policy that recognises that mediation may not be appropriate in family law matters where there has been violence. It was stated that it was important not to remove the woman's choice as it again reinforces the woman's lack of control that was characteristic of the violent relationship. It must not be assumed that every woman is 'powerless': Bunbury Community Legal Centre WA *Submission 97*.

A repeat respondent could be referred directly to hearing if the matter involved serious discrimination, for example sexual harassment which amounts to serious sexual assault. A repeat respondent could also be referred directly to a hearing after a number of occasions of having violated the SDA. The SDC has stated that it is not practicable to establish a minimum number of complaints to trigger the SDC to consider the respondent as a repeat offender: Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 6.68.

SDA s 83 (1).

Affirmative Action Agency Cth *Submission 349*; Sex Discrimination Commissioner *Submission 338*.

Affirmative Action Agency Cth *Submission 349*.

Anti-Discrimination Commissioner QLD *Submission 337*. For example, employers failing to comply with affirmative action requirements over a period of time could be referred to the SDC for investigation whether there is or has been unlawful discrimination. It should be possible to investigate whether complaints made against an employer under the SDA can be linked to the employer's compliance with the AAA.

Affirmative Action Agency Cth *Submission 349*. The submission comments that a number of small joint projects have already been agreed to. The submission also points out that there are limitations to this approach. For example, as a result of the fact that the AAA only covers employers with more than 100 employees.

ALRC DP 54, para 4.29.

Australian Federation of Business & Professional Women Inc *Submission 251*. See also Confidential *Submission 190*; Confidential *Submission 198*; Tasmanian Gay & Lesbian Rights Group *Submission 280*; Women's Electoral Lobby Australia *Submission 281*; Anti-Discrimination Commissioner QLD *Submission 337*.

Confidential *Submission 198*.

Tasmanian Gay & Lesbian Rights Group *Submission 280*.

Confidential *Submission 190*.

Anti-Discrimination Commissioner QLD *Submission 337*. The case concerned proceedings brought at common law by a woman in Tasmania based on sexual harassment. The jury decided in favour of the woman and awarded her a total of \$120 529 in damages. The woman brought the action against the Hobart City Council, her supervisor and two co-workers. The Council was sued for negligence in that it failed to supervise and provide a safe workplace for her. The two co-workers were sued for assault and battery. The supervisor was sued for assault, battery and false imprisonment. The case was brought as a civil suit as Tasmania has no State anti-discrimination legislation, the SDA did not apply because of the exemption for state instrumentalities, s 13, and it may have been difficult for the woman to sustain the case under

the criminal law. The benefit of civil proceedings was the control it allowed the complainant in how the matter was conducted. It has been said that the outcome of this case has given 'work-place sexual assault and sexual harassment the same status as any other industrial injury': R Browne 'Common law victory' (1993) 18 *Alternative Law Journal* 243.

Women's Electoral Lobby Australia *Submission* 281.

Confidential *Submission* 190. The court when determining an award for non-economic loss assigns the injury a number between 1 and 60. This number is then to be multiplied by \$1000.00 (in 1987) indexed to inflation.

SDA s 81(1).

M Thornton *The Liberal Promise: Anti-Discrimination Legislation in Australia* Oxford University Press Melbourne 1990, 196.

The need for a flexible approach to awarding damages was stressed in *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) EOC #92-250 per Lockhart J. It appears that exemplary damages are not available under the SDA given the use of the term compensation in SDA S 81(1)(b)(iv): C Ronalds *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* Second Edition Pluto Press Sydney 1991, 213.

C Niland 'Discrimination and conciliation: the Qantas fiasco' in L Spender (ed) *Human Rights: The Australian Debate* Redfern Legal Centre Publishing Redfern 1987, 154. It was suggested, however, that complainants under the SDA are now receiving less in conciliated settlements compared to when the Act was first introduced: ALRC *Consultation* S Walpole Sex Discrimination Commissioner 10 December 1993.

Sex Discrimination Commissioner *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry into Sexual Harassment in the Australian Defence Force* HREOC Sydney 1993, para 5.46.

See rec 3.15.

Sex Discrimination Commissioner *Submission* 338.

See Australian Law Reform Commission Report No 67 (Interim) *Equality before the law: women's access to the legal system* Sydney 1994 (ALRC 67) ch 4.

ALRC 67 para 4.16-4.21.

At least 75%: estimate obtained from Legal Aid and Family Services, Canberra. This estimate was calculated on the basis that 57% of total expenditure by LACs in 1992-93 (providing representation in approximately 65 000) was on litigation and representation was provided in-house in a further 57 000 cases. This is regarded as a conservative estimate.

The proportion was 56% in the July-September 1993 quarter: *Legal Aid and Family Services Quarterly Legal and Statistical Bulletin* July-September 1993 Attorney-General's Department Canberra 1994, Table 6, 18.

Although under s 96 of the Constitution the Commonwealth has the power to make tied grants to the States and Territories for any purpose and on any conditions that the States and Territories agree, it has never used this power in relation to legal aid. For a discussion see Office of Legal Aid and Family Services *Issues involved in the Commonwealth setting more specific standards in its grants of legal aid in Legal Aid Commissions* Attorney-General's Department Canberra 1993 (unpublished paper). It appears doubtful that at present such an agreement would bind the State LAC concerned in any way.

In Western Australia, South Australia, Tasmania and the Northern Territory the proportion is 60%. In 1992-93 the Commonwealth provided 57% of funding: Law Council of Australia *Legal aid funding in the '90s* Law Council of Australia Canberra 1994, 41. Even within the share of the budgets provided by the States and Territories themselves, the State Government itself only provides a certain proportion of the funding.

Varying between 47.6% and 100% in individual States and Territories: statistics calculated from figures provided in Attorney-General's Department *Annual Report 1992-93* vol 2, Attorney-General's Department Canberra 1993, 176.

AJAC *Access to Justice - an action plan overview* AGPS Canberra 1994, 239.

Office of Legal Aid and Family Services *Issues involved in the Commonwealth setting more specific standards in its grants of legal aid in Legal Aid Commissions* Attorney-General's Department Canberra 1993, 4-5 (unpublished paper).

The areas are as follows: whether a basic human right is in jeopardy; whether alternative dispute resolution options have been utilised; the applicant's means and ability to contribute towards costs; and the likelihood of a favourable outcome in the contemplated proceedings. These guidelines were widely distributed and formally adopted by most LACs and some law societies, bar councils and State Ministers. There are also Guidelines on legal aid concerning the statutory and non-statutory schemes administered by Legal Aid and Family Services within the Attorney-General's Department.

For instance, cases under the Child Support Scheme and certain war veterans matters. *Legal Aid and Family Services Gender Bias in Litigation Legal Aid* Attorney-General's 1994, 29.

id 29-30.

id 26-27.

Law Council of Australia *Legal aid funding in the '90s* Law Council of Australia, Canberra 1994, 14-17. This report found that since 1987-88 there has been an apparent 18% increase in demand for legal aid funding.

id, 2.

F Fomin *Submission* 292.

M J Mossman, 'Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change' (1993) 15 *Sydney Law Review* 30, 43.

Legal Aid and Family Services *Gender Bias in Litigation Legal Aid: An Issues Paper* Attorney-General's Department Canberra 1994.

ibid, 2.

Calculated from figures obtained from Legal Aid and Family Services.

Legal Aid and Family Services *Gender bias in Litigation Legal Aid* Attorney-General's Department Canberra 1994, 14.

Figure obtained from Legal Aid and Family Services Canberra.

Legal Aid and Family Services *Gender Bias in Litigation Legal Aid: An Issues Paper* Attorney-General's Department Canberra 1994, 8-9, 25.

Calculated from the figures provided in Legal Aid and Family Services *Quarterly Legal Aid Statistical Bulletin July - September 1993* Attorney-General's Department Canberra 1994, Table 2, 10. The Commission also received submissions providing gender breakdowns of legal aid grant statistics in several individual States and Territories: eg F Fomin *Submission* 292; Legal Services Commission of SA *Submission* 236; Legal Aid Office ACT *Submission* 294; Confidential *Submission* 385.

Legal Aid and Family Services *Gender bias in Litigation legal aid: an issues paper* Attorney-General's Department Canberra 1994, 34.

id 40.

In 1992-93 applications concerned criminal matters in 62% of cases, family law matters in 27% of cases and civil matters in 11% of cases. Between 2 and 4%.

In the remaining LACs there was no imbalance in favour of either sex.

Legal Aid and Family Services *Gender Bias in Litigation Legal Aid: An Issues Paper* Attorney-General's Department Canberra 1994, 19-21.

In 1992-93, 62% of applications were for criminal matters, while 72% of approvals were. Conversely, family law matters constituted 27% of applications but only 21% of approvals, while civil matters constituted 11% of applications and only 7% of approvals. Legal aid and Family Services *Gender Bias in Litigation. Legal Aid: An Issues Paper*, Attorney-General's Department, Canberra 1994, 24.

Legal Aid and Family Services *Gender Bias in Litigation Legal Aid: An Issues Paper* Attorney-General's Department Canberra 1994.

Legal Aid Commission of Queensland.

Confidential consultation with LAC officer.

Legal Aid and Family Services *Gender Bias in Litigation Legal Aid Attorney-General's*, Canberra 1994, 7.

Law Council of Australia, *Legal and funding in the '90s*. Law Council of Australia, Canberra 1994, 18.

Legal Aid and Family Services *Gender Bias in Litigation Legal Aid Attorney-General's*, Canberra 1994, 25.

(1992) 177 CLR 292.

id at 312 per Mason CJ and McHugh J (emphasis added).

The dissenting judges (Brennan and Dawson JJ) consider the question of whether the court (as opposed to the legislature or the executive) is really the most appropriate body to make decisions which require legal aid bodies to allocate their resources in particular ways: id at 317-321 and 350.

s 27 *Crimes (Criminal Trials) Act* 1993 (Vic) inserted s 360A into the *Crimes Act 1958* (Vic). For a discussion see J Lynch 'Section 360A and the Dietrich dilemma' (1993) 67(9) *Law Institute Journal* 838.

s 360A(3) *Crimes Act 1958* (Vic).

The Directors of the Legal Aid Commissions of Australia *Submission* 602.

eg Confidential *Submission* 385; Women's Legal Resources Centre *Submission* 256; M Court *Submission* 443; Outer East Domestic Violence Outreach Service *Submission* 249; Women Lecturers and Students of the Faculty of Law University of Tasmania *Submission* 258; Illawarra Legal Centre *Submission* 284; *Sensitive Submission*; Office of the Status of Women Cth *Submission* 543; Sex Discrimination Commissioner Cth *Submission* 338.

Sensitive Submission Several other submissions were to the same effect eg J Wilczynski *Submission* 559; Illawarra Legal Centre *Submission* 284.

M Court *Submission* 443.

The House of Representatives Standing Committee on Legal and Constitutional Affairs *Half Way to Equal: Report into Equal Opportunity and Equal Status for Women in Australia* AGPS Canberra 1992, 234 reported that it is difficult to obtain legal aid for sex discrimination complaints. This was also noted by the *Submission* 543.

Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission (1993) *Future Directions and Strategies* AGPS Enfield.

In the Marriage of Sajdak and Sajdak (1993) FLC 92-348 at 79,687. See also Family Court of Australia *Submission by the Family Court of Australia to the Joint Select Committee on certain aspects of the operation and interpretation of the Family Law Act* vol (f) 1992, 43 which states that legal aid funding for family law matters should not be affected by the requirements for legal aid in criminal matters. In vol (b), 32 it is also suggested that consideration should be given to liberalising the availability of legal aid in enforcing access orders in cases which have become intractable.

McOwan and McOwan (1994) FLC 92-451 at 80, 691.

E van Moorst and K Deverell for Women's Legal Resources Group 'Justice for All: Women's Access to Legal Aid in Victoria' (1993) 1 *The Australian Feminist Law Journal* 147.

For example Redfern Legal Centre *Women's domestic violence court assistance scheme: evaluation* Redfern Legal Centre Sydney 1991, table 3.3 & 3.6, 23-4, which noted that apprehended violence orders (AVO) were granted to 74.3% of those represented by the Women's Domestic Violence Court Assistance Scheme, 50% of those represented by other practitioners and 40% of those represented by police. Only 3% of those unrepresented were granted an AVO. See also Domestic Violence Legal Help Darwin *Submission* 306.

MJ Mossman, 'Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change' (1993) 15 *Sydney Law Review* 30, 48.

Art 14.

Art 23 and 25.

See K Funder M Harrison and R Weston *Settling down: pathways of parents after divorce* Australian Institute of Family Studies 1993.

In this Report, the terms protection order, domestic violence order, restraining order and apprehended violence order are used interchangeably. These terms are all in use in different States and Territories.

Women Lecturers and Students of the Law School University of Tasmania *Submission* 258. This was one of the major problems concerning women's access to legal aid identified by both the presenters to and participants in a recent seminar held by the New Zealand Legal Services Board: Legal Services Board *Are women getting the help they need from the Legal Aid scheme?* Report from the Women's Suffrage Centennial Forum 27 November 1993, Legal Services Board Wellington New Zealand 1994, 2, 3, 4, 9, 10, 11, 14, 17, 19.

J Batts 'The poor and the rich: legal aid and the rest' *Challenging the legal system's response to domestic violence* conference Hilton Hotel Brisbane 23-26 March 1994.

Women Lecturers and Students of the Law School University of Tasmania *Submission* 258.

id.

Women's Legal Resources Centre *Submission* 256.

id.

Sensitive Submission.

This brought the total number of grants to 33000. In the five years before the changes were introduced, there had been a 6% increase in the number of criminal cases funded, but a decrease of 44% in family law grants and 58% in civil law grants. The guidelines for granting aid have been amended to reflect these additional resources. For example, it will now be easier to obtain funding for consent orders, family law matters which do not involve property settlement, limited cases in which the custodial parent wishes to move away permanently against the wishes of the non-custodial parent, and cases before the Social Security Appeals Tribunal and Crimes Compensation Tribunal: 'Legal aid grants increase' (1994) 1 *The Law Institute News* 1.

The criminal injury unit had succeeded in 12 criminal injury compensation cases with awards totalling almost \$300 000, and almost 50 further cases were in progress, most involving sexual or physical assault. The discrimination unit was involved in 55 cases and had negotiated out-of-court settlements of up to \$15 500 in cases of alleged sexual harassment: Personal communication Paul Friedman, Manager of General Law and Specialist Legal Units, Family and General Law Division, Legal Aid Commission Queensland.

Consultation with G Quinlivan Assistant Director Legal Aid Commission Queensland.

See also ch 9.

Outer East Domestic Violence Outreach Service Collective Inc Victoria *Submission* 249.

id.

H Astor for NCVAW *Guidelines for use if mediating in cases involving violence against women* NCVAW Canberra 1992, 13.

R Alexander 'Mediation' *Challenging the legal system's response to Violence* Conference Brisbane 25 March 1994.

Ministry for the Status and Advancement of Women NSW *Submission* 350. The Commission was also told that in Victoria it was very difficult for women to argue that they fell within the domestic violence exemption for court counselling: Outer East Domestic Violence Outreach Service Collective Inc Victoria *Submission* 249. LAC (ACT) stated that 'women feel pressured and agree to certain terms for the sake of peace' *Submission* 294.

G Quinlivan 'The poor and the rich: legal aid and the rest' Challenging the legal system's response to domestic violence Conference, Brisbane 23-6 March 1994.

eg R Alexander 'Mediation' Challenging the legal system's response to Violence Conference Brisbane 25 March 1994.

Women's Legal Resources Centre *Submission 256*; R Alexander 'Mediation' Challenging the Legal System's Response to Violence Conference, Brisbane 25 March 1994.

Women's Legal Resources Centre *Submission 256*; Outer East Domestic Violence Outreach Service Collective Inc Victoria *Submission 249*.

T Gee & P Urban 'Co-mediation in the Family Court' 5(1) *Australian Dispute Resolution Journal* 42 (February 1994).

ALRC *Consultation* Chief Justice Nicholson, Family Court, 3 March 1994.

Legal Service Commission of SA *Submission 236*.

Sajdak and Sajdak (1993) FLC 92-348 at 79,686 and 79,687.

id.

Legal Services Commission of SA survey.

AJAC *Access to Justice - an action plan* AGPS Canberra 1994, 249.

id 251. This body would provide legal aid impact statements, identify changes in demand for legal aid, develop minimum legal aid eligibility standards and formulate strategies on how LACs can use their combined national market power as effectively as possible.

id, 240.

The Commonwealth has two members on the LAC Boards of Management of each State and the NT, and one in the ACT.

Legal Aid and Family Services *Gender Bias in Litigation* Legal Aid Attorney General's, Canberra 1994, 29.

id 29.

Submission 602.

AJAC *Access to Justice - an action plan* AGPS Canberra 1994, 244.

Submission 286.

AJAC *Access to Justice - an action plan* AGPS Canberra 244.

E van Moorst and K Deverall 'Justice for all: women's access to legal aid and justice in Victoria' (1993) 1 *Australian Feminist Law Journal* 147.

For example, it has been estimated that \$100 000 of legal aid funding will buy the following services: one complex criminal trial and appeal; 14 custody cases or serious criminal trials; 67 AAT hearings or summary criminal hearings; 360 negotiations or guilty pleas; or 4000 advice interviews or duty solicitor services: Legal Services Commission of SA *Submission 236*.

Legal Services Commission of SA *Submission 236*. Women constituted 57% and 65% of the users of these services respectively. See Chapter 5.

eg in Victoria the proportion is approximately 25% and in NSW 75%: Legal Aid and Family Services *Legal Aid in Australia 1992-3 Statistical Yearbook* Attorney-General's Department 1994, 36.

Equality before the law: women's access to the legal system Report No 67 (Interim) 56-57.

Women's Legal Resources Centre, Sydney *Submission 256*; Domestic Violence Advocacy Service, Sydney *Submission 148*; Domestic Violence Legal Help, Darwin *Submission 306*; Women's Legal Service Inc, Brisbane *Submission 379*; Confidential *Submission 427*; Confidential *Submission 428*.

See for example Office of Legal Aid and Family Services Community Legal Centres: A study of Four Centres in New South Wales and Victoria Australian Government Publishing Service Canberra 1991 for an explanation of the role of community legal centres.

Women's Legal Resources Centre, Sydney *Submission 256*.

Women's Legal Resources Centre, Sydney *Submission 256*; Domestic Violence Advocacy Service, Sydney *Submission 148*; Domestic Violence Legal Help, Darwin *Submission 306*.

For the Women's Legal Resources Centre in Sydney, 70% of calls relate to family law issues and many of these involve issues of physical and/or sexual abuse.

Women's Legal Resources Centre, Sydney *Submission 256*.

'STD calls are individually itemised on telephone accounts, allowing anyone who sees an account to know the numbers phoned. By nature 008 calls are charged at the local call rate and are not individually itemised.

Women's Legal Resources Centre, Sydney *Submission 256*.

Women's Legal Service Inc, Brisbane *Submission 379*; Women's Legal Resources Centre Annual Report 1992-1993, 8.

Women's Legal Resources Centre, Sydney *Submission 256*.

Women's Legal Resources Group, Melbourne 10 years on . . . Annual Report 1992-1993.

Women's Legal Service Inc, Brisbane *Submission 379*; Women's Legal Service Annual Report 1992.

Women's Legal Service Steering Committee WA *Submission 360*.

North Queensland Combined Women's Service *Submission 275 & Submission 498*.

It provides telephone legal advice four and a half days per week, representation for women seeking protection orders, referrals to counselling services and other solicitors where the service's solicitors are unavailable. The service has recently provided a 008 telephone service providing free and confidential information to rural victims of domestic violence. The service also conducts community education workshops for key service providers and recommends law reform: Domestic Violence Advocacy Service, Sydney *Submission 148*.

Domestic Violence Legal Help, Darwin *Submission 306*.

To the Commission's knowledge there are three schemes operating in metropolitan Sydney; one at Redfern Local Court, Waverley Local Court and Parramatta Local Court. The scheme operating at Burwood Local Court has recently lost its funding. Other schemes are operating in Darwin, Brisbane and Hobart.

Most State and Territory governments have a domestic violence information service within a department. The Commission received submissions from groups such as Centre Against Sexual Assault Inc, Bendigo *Submission 11*; Outer East Domestic Violence Outreach Service Collective Inc VIC *Submission 249*; Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*; Domestic Violence Action Group, Port Lincoln *Submission 453*; Sexual Assault Referral Centre NT *Submission 540*.

The Women's Legal Resources Centre in Sydney contacts close to 4000 individual women in a year through the telephone advice service and workshops, even though funding limits them to only one telephone advice line: Women's Legal Resources Centre, Sydney *Submission 256*.

The Women's Legal Service in Brisbane has been the contact point for 5000 individual women and for thousands more through community workshops: Women's Legal Service Inc, Brisbane *Submission 379*.

Domestic Violence Legal Help, Darwin *Submission 306*.

Women's Legal Resources Centre, Sydney *Submission 256*.

ibid.

Women's Legal Service Inc, Brisbane *Submission 379*.

Office of Legal Aid and Family Services Attorney General's Department Community Legal Centres: A Study of Four Centres in New South Wales and Victoria AGPS July 1991.

ibid 25-27.

Women's Legal Resources Centre, Sydney Submission 256.

Office of Legal Aid and Family Services, Attorney General's Department Community Legal Centres; A study of Four Centres in New South Wales and Victoria AGPS, July 1991, 27.

Women's Legal Resources Centre, Sydney Submission 256.

National Conference of the Association of Non-English Speaking Background Women of Australia Consultation Sydney 8-9 April 1994.

ibid.

For example, there was a repeated plea for such services in consultations conducted in Alice Springs: K McNab Submission 434; Central Australian Advocacy Service Submission 433; Women's Information Service Consultation Alice Springs 23 August 1993.

Women's Legal Resources Centre, Sydney Submission 256; Waratah Support Centre, Bunbury Submission 109; North Queensland Combined Women's Service Submission 498; Confidential Submission 367; M Alston Submission 394; Confidential Submission 103; Domestic Violence Advocacy Service, Sydney Submission 148; C Major Submission 46.

G Quinlivan, Assistant Director Legal Aid Commission of Queensland Consultation.

ALRC 67 para 4.23.

The Aboriginal Women's Legal Issues Group in Sydney has been granted \$50 000 from the NSW Legal Aid Commission towards the establishment of such a service. At the 'Challenging the Legal System's Response to Domestic Violence' Conference Brisbane 23-26 March 1994 a fund was opened seeking donations from conference participants to help establish an Aboriginal and Torres Strait Islander women's legal service in Brisbane.

Aboriginal Women's Legal Issues Group, Sydney Submission 558.

Within the Australian female population, indigenous women are particularly disadvantaged. Aboriginal and Torres Strait Islander women have a shorter life expectancy: 1% of Aboriginal and Torres Strait Islander females are aged over 75 years compared to 5% of all Australian females: Women in Australia Australian Bureau of Statistics Canberra 1993, 10. Of Aboriginal and Torres Strait Islander women over 15 years of age, about 90% have no post school qualifications; about 74% have incomes below \$9000 pa; and their unemployment rate is 34%: Department of Prime Minister and Cabinet Office of the Status of Women Women in Australia: Australia's Second Progress Report on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Australian Government Publishing Service Canberra 1992, 10.

Department of Prime Minister and Cabinet Office of the Status of Women Women in Australia: Australia's Second Progress Report on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Australian Government Publishing Service Canberra 1992, 10.

Barriers to services created by isolation are particularly relevant to the indigenous population. A third of Aboriginal and Torres Strait Islanders live in rural areas; about 24% in major urban centres; and the remainder in other urban areas. This distribution is different from the non-indigenous population, 15% of whom live in rural areas, 63% in major urban centres and 22% in other urban areas: Department of Prime Minister and Cabinet Office of the Status of Women Women in Australia: Australia's Second Progress Report on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Australian Government Publishing Service Canberra 1992, 11.

See generally P Daylight & M Johnstone Women's Business Report of the Aboriginal Women's Task Force Australian Government Publishing Service Canberra 1986; S Rintoul The Wailing: A National Black Oral History William Heineman Australia Melbourne 1993.

The 1992 National Prison Census records that 14.1% of male prisoners and 18.0% of female prisoners are Aboriginal, while Aboriginal people comprise only 1.5% of the general population: J Walker Australian Prisoners 1992: Results of the National Prison Census 30 June 1992 Australian Institute of Criminology Canberra 1993, 22 and 119-20.

id 23.

J Harrison 'How can the Family Court be made more relevant to the community?' Paper 'Challenging the Legal System's Response to Domestic Violence' Conference Brisbane 23-26 March 1994.

In the Northern Territory between 1 January 1980 and 31 May 1989, the reporting period of the Royal Commission, there were nine Aboriginal deaths in custody. During the same period Northern Territory police crime reports record 39 homicides of Aboriginal women: Department of Prime Minister and Cabinet Office of the Status of Women Women in Australia's Second Progress Report on implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Australian Government Publishing Service Canberra 1992, 13.

Confidential Submission 428 recounts that even assaults causing grievous bodily harm against Aboriginal women are often not reported and, when reported, are often not treated seriously by the police or the courts. Also see J Atkinson 'Violence Against Aboriginal Women' (1990) 2(46) Aboriginal Law Bulletin.

Women's Information Service Alice Springs Consultation Alice Springs August 1993; J Devlin Consultation Alice Springs August 1993; S Gilmour Submission 276.

Confidential Submission 428.

Unreported decision of the Court of Appeal Supreme Court of Queensland CA 29 November 1993, 3.

id 17.

Women's Information Service, Alice Springs Consultation Alice Springs 23 August 1993.

J Lloyd & N Rogers 'Crossing the last frontier: problems facing Aboriginal women victims of rape in Central Australia' Paper 'Without Consent: Confronting Adult Sexual Violence' Conference Melbourne 27-29 October 1992, 155.

Confidential Submission 427; M Paxman & H Corbett 'Listen to us: Aboriginal women and the white law' (1994) 5(3) Criminology Australia 2-6, 6; P Daylight & M Johnstone Women's Business Report of the Aboriginal Women's Task Force Australian Government Publishing Service Canberra 1986, 1-2.

Confidential Submission 427.

Confidential Submission 427.

J Lloyd & N Rogers 'Crossing the last frontier: problems facing Aboriginal women victims of rape in Central Australia' Paper 'Without Consent: Confronting Adult Sexual Violence' Conference Melbourne 27-29 October 1992 152-3.

id 150-1.

References to existing Aboriginal and Islander legal services (generally known as ALS's) are to the national network of services administered through the National Aboriginal and Islander Legal Services Secretariat (NAILSS), Sydney NSW. These services are officially funded through ATSIC in Canberra. There are a total of 49 services in the network: 1 in the ACT; 11 in NSW; 4 in the NT; 11 in Qld; 4 in SA; 3 in Tas; 1 in Vic and 14 in WA.

The Commission was informed by a representative of NAILSS on 29 March 1994 that these policies, where they exist, are determined by each ALS office independently. The Commission was alerted to the unintended discriminatory effect of these common ALS policies by people within and outside ALS offices. The submissions which address this issue include: Confidential Submission 428; Women's Legal Resources Centre, Sydney Submission 256; Aboriginal Women's Legal Issues Group, Sydney Submission 558; Sisters-in-Law Submission 195; J Blokland Submission 347; Women's Legal Service Inc, Brisbane Submission 379; L Santo Submission 352; Domestic Violence Legal

Help, Darwin Submission 422; L Goodchild Submission 497. It was also raised repeatedly in consultations in Alice Springs, Darwin and Townsville.

Also see ch 4 regarding the similar unintended discriminatory effect of the policy to give priority to criminal cases at the expense of other matters within Legal Aid Commissions.

Sisters-in-Law Submission 195.

Women's Legal Service Inc, Brisbane Submission 379.

Sisters-in-Law Submission 195; Women's Legal Resources Centre, Sydney Submission 256.

For example the night patrols at Yuendumu, Mutitjulu and Santa Teresa, in the NT.

J Lloyd & N Rogers 'Crossing the last frontier: problems facing Aboriginal women victims of rape in Central Australia' Paper 'Without Consent: Confronting Adult Sexual Violence' Conference Melbourne 27-29 October 1992 162.

An organisation of Ngaanyatjarra Pitjantjatjara Yankunytjatjara women from communities and outstations in Western Australia, South Australia and the Northern Territory.

The demand for vehicles arises when community vehicles are monopolised by men.

See Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Minyma Tjuta Tjunguringkula Kunpuringanyi Women Growing Strong Together Asprint Alice Springs 1990 for a summary of these and other initiatives of the organisation during its first 10 years from 1980-1990.

Atunypu Wiru Minyma Uwankaraku (Good Protection for all Women Project).

See Chapter 6.

P Greer and Associates Andelain Consultancy Women's Business Project Wilcannia 1991 Pam Greer and Associates Sydney 1991.

'Challenging the Legal System's Response to Domestic Violence' Conference Brisbane 23-26 March 1994.

This is being increasingly recognised by service providers and funding bodies. For example the National Family Violence Intervention Program (NFVIP), which is currently being implemented by ATSIC, over three and a half years to June 1995, is aiming to establish 10 projects in different communities. It is recognised that the community based approach will necessitate adapting the projects to local needs.

J Lloyd & N Rogers 'Crossing the last frontier: problems facing Aboriginal women victims of rape in Central Australia' Paper 'Without Consent: Confronting Adult Sexual Violence' Conference Melbourne 27-29 October 1992 163.

This was a strong theme in ALRC consultations and submissions and in discussions attended by ALRC staff at 'Challenging the Legal System's Response to Domestic Violence' Conference Brisbane 23-26 March 1994.

M Paxman & H Corbett 'Listen to us: Aboriginal women and white law' (1994) 5/3 Criminology Australia 2-6.

See the analysis and recommendations in Australian Law Reform Commission Report No 31 The Recognition of Aboriginal Customary Laws AGPS Sydney 1986 (ALRC 31).

AJAC refers to the recommendations of the Royal Commission into Black Deaths in Custody that there should be 'funding of Aboriginal legal services to a level that recognises their role in research and law reform . . . and location of Aboriginal legal services to facilitate ties with local Aboriginal communities' AJAC Access to Justice - an action plan AGPS Canberra 1994, 38.

National Committee to Defend Black Rights Submission 58; Domestic Violence Advocacy Service, Sydney Submission 148; Women's Legal Resources Centre, Sydney Submission 256; Sisters-in-law Submission 195; Confidential Submission 201; J Blokland Submission 347; Ministry for the Status and Advancement of Women NSW Submission 350; Confidential Submission 116; Women's Legal Service Inc, Brisbane Submission 379; Confidential Submission 427; Aboriginal and Torres Strait Islander Corporation for Women QLD Submission 551; Aboriginal Women's Legal Issues Conference, Parramatta, 19 June 1993 recommends the establishment of an Aboriginal Women's Legal Resource and Advocacy Centre in New South Wales (Recommendation 1.1); Women's Business Project Wilcannia report 1991 recommends that 'legal services be provided to Aboriginal women who are victims of violence at the hands of Aboriginal men.'; 'Challenging the Legal System's Response to Domestic Violence' Conference Brisbane 23-26 March 1994 recommends that Aboriginal Women's Legal and Advocacy Services be funded nationally (Recommendation 1A(i)).

Aboriginal Women's Legal Issues Group, Sydney Submission 558.

Aboriginal Women's Legal Issues Group, Sydney Submission 558.

See para 5.27.

See para 5.28.

Access to Justice Advisory Committee *Access to Justice: an Action Plan* Australian Government Publishing Service Canberra 1994. The Committee supported funding for community based programs after evaluation of the programs.

L Blazejowska 'Court support schemes - improving women's access to the legal system: the Redfern model of court support for women victims of domestic violence' *Paper 'Challenging the Legal System's Response to Domestic Violence' Conference* Brisbane 23-26 March 1994.

R Martin Submission 290.

L Blazejowska *The Women's Domestic Violence Court Assistance Scheme (WDVCAS)* Redfern Legal Centre 1993.

Schemes are operating from Darwin Community Legal Centre, Hobart in Tasmania and four areas of metropolitan Sydney, from Kingsford Legal Centre, Burwood Community Welfare Services, Redfern Legal Centre and Macquarie Legal Centre. Queensland has a number of different schemes operating in urban and regional areas. Court schemes operate at the largest courts in Brisbane and Beenleigh. Volunteer support workers from other domestic violence organisations help women fill out application forms for protection orders. In relation to representation, it is more common for women to be represented at hearings by the scheme where legal aid has been refused. At Hamilton, New Zealand full time court support persons provide a more extensive service.

Appendix 1 outlines the Redfern model.

R Martin Submission 290.

Parramatta Domestic Violence Court Assistance Scheme *Six Month Evaluation Report* November 1993.

L Blazejowska *The Women's Domestic Violence Court Assistance Scheme (WDVCAS)* Redfern Legal Centre 1993.

id 7-8.

id 9.

id 9.

S Harris *Evaluation pilot project; Waverley Domestic Violence Court Assistance Scheme* Eastern Suburbs Domestic Violence Committee April 1994.

id 14.

id 8.

id 9.

Parramatta Domestic Violence Court Assistance Scheme *Six Month Evaluation Report* November 1993.

S Harris *Evaluation pilot project; Waverley Domestic Violence Court Assistance Scheme* Eastern Suburbs Domestic Violence Committee April 1994, 8-9.

A Dunne *Submission 603.*

S Harris *Evaluation pilot project; Waverley Domestic Violence Court Assistance Scheme* Eastern Suburbs Domestic Violence Committee April 1994.

Burwood Community Welfare Services Incorporated *Consultation* 12 April 1994.

For example the Domestic Violence Service, Caboolture and the Domestic Violence Service, Toowoomba. There is an express interest in operating their own schemes based on the Redfern model.

'Challenging the legal system's response to domestic violence' *Conference* 23-26 March Brisbane 1994.

Australian Law Reform Commission Report No 67 (Interim) *Equality before the law: women's access to the legal system* ALRC Sydney 1994 (ALRC 67).

Z Pobucky, C Almain-Leyson *Submission* 122; Domestic Violence Advocacy Service, Sydney *Submission* 148; Women's Legal Resources Centre, Sydney *Submission* 256; S Goiser *Submission* 273; Mt Pritchard Family Resources Centre NSW *Submission* 329; Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission* 330; A Lucadou-Wells *Submission* 344; Confidential *Submission* 368; Migrant Women's Emergency Service QLD *Submission* 388; South Brisbane Legal Service *Submission* 389; Bureau of Ethnic Affairs NSW *Submission* 391; M Dimopolous *Submission* 592.

Australian Law Reform Commission Report No 57 *Multiculturalism and the law* ALRC Sydney 1992 (ALRC 57).

This varies from State to State: Attorney-General's Department *Access to Interpreters in the Australian Legal System: Report* AGPS Canberra 1991.

Z Pobucky, C Almain-Leyson *Submission* 122; Domestic Violence Advocacy Service, Sydney *Submission* 148; Women's Legal Resources Centre, Sydney *Submission* 256; S Goiser *Submission* 273; Mt Pritchard Family Resources Centre NSW *Submission* 329; Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission* 330; A Lucadou-Wells *Submission* 344; Confidential *Submission* 368; Migrant Women's Emergency Service QLD *Submission* 388; South Brisbane Legal Service *Submission* 389; Bureau of Ethnic Affairs NSW *Submission* 391; M Dimopolous *Submission* 592.

S Goiser *Submission* 273.

Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission* 330.

Women's Legal Resources Centre, Sydney *Submission* 256.

ibid.

Access to Justice Advisory Committee *Access to Justice: an Action Plan* Australian Government Publishing Service Canberra 1994 Action 2.1, 51.

ibid 45-46 states that the *Crimes Act 1914* (Cth): a right to an interpreter during police questioning for federal offences or for more serious offences in the ACT; *Summary Offences Act 1953* (SA): people under arrest are entitled to be assisted by an interpreter during police questioning; *Crimes (Custody and Investigation) Act 1988* (VIC): police must arrange an interpreter before questioning; *Crimes Amendment Act 1993* (ACT): a right to an interpreter in the investigation of summary offences.

A recent review of the Supported Accommodation Assistance Program in Victoria reported that the users of domestic violence services and specifically women's refugees were far more likely to come from a non-English speaking background. 45% of users of women's refugees identified themselves as coming from a non-English speaking background: Supported Accommodation Assistance Program Service Systems Review Victoria *Domestic Violence Services* March 1994.

Domestic Violence Advocacy Service, Sydney *Submission* 148; Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission* 330; M Dimopolous *Submission* 592.

'Challenging the legal system's response to domestic violence' *Conference* 23-26 March Brisbane 1994.

Domestic Violence Advocacy Service, Sydney *Submission* 148.

Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission* 330.

Australian Federal Police *Procedures Advice Manuals General Instruction 34 Interpreters - Translators* PAMS Branch Australian Federal Police.

Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission* 330.

In Darwin, there is a current commitment to improving services to the non-English speaking background community. Currently the police college itself has a non-English speaking background recruitment strategy, and cross-cultural awareness training has become an integral part of the training course. Similarly, the NSW Police Academy at Goulburn has its own cultural awareness training.

This is also true of federal tribunals: see Access to Justice Advisory Committee *Access to Justice - an action plan* AGPS Canberra 1994, 47.

id 46: *Evidence Act 1971* (ACT) provides that a party or a witness is entitled to be assisted by an interpreter if they are unable to communicate in English; *Children and Young Persons Act 1989* (VIC) there is a statutory right to an interpreter for witnesses and parties in proceedings in the Children's Court and in the Magistrates Court for defendant charged with an offence punishable by imprisonment if the court is satisfied that the person does not have adequate English, *Magistrates Court Act 1989*(VIC); *Evidence Amendment Act 1986* (SA) provides that witnesses in any action, trial or matter have the right to an interpreter if English is not their native language and they are not reasonably fluent in English.

M Dimopolous *Submission* 592.

Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission* 330.

Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission* 330; S Goiser *Submission* 273.

M Dimopolous *Submission* 592.

Centre Against Sexual Assault, CASA House, Melbourne *Submission* 197.

M Dimopolous *Submission* 592.

ALRC 57, xxvi.

id xxvii.

ibid.

ibid.

ibid.

Evidence Bill 1991 (Cth) cl 34.

Evidence Bill 1993 (NSW) cl 31.

The Family Court in 1992/1993 spent \$24 383 on interpreter services and a further \$23 265 for the first six months of the 1993/1994 financial year. In contrast, the Social Security Appeals Tribunal last year heard 2680 appeals of which nearly a quarter required the use of an interpreter at a total cost of \$80 520 or approximately \$100 per appeal.

Family Court of Australia, Office of the Chief Executive *Policy guidelines for the use of interpreters* January 1993.

Mt Pritchard Family Resource Centre NSW *Submission* 329.

Mt Pritchard Family Resources Centre NSW *Submission* 329; S Goiser *Submission* 273; Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission* 330; Migrant Women's Emergency Service QLD *Submission* 388; M Dimopolous *Submission* 592.

Violence Against Women and Children Working Group, Federation of Community Legal Centres Inc VIC *Submission* 330.

Administrative Appeals Tribunal Practice Direction *Working with Interpreters* 8 February 1993.

M Dimopolous *Submission* 592.

Whitford Women's Health Centre WA *Submission 10*.

E Hill, Migrant Workers Centre SA *Forum organised by the Domestic Violence Prevention Unit and Women's Advisor to the Premier and Cabinet* Adelaide 25 August 1993; Women of Far North Queensland *Submission 117*.

The Access to Justice Committee recommends in its list of actions the implementation of a court charter in all federal courts and tribunals (Action 15.1). They also recommended that the Australian Government together with the States should endeavour to finalise arrangements for a national scheme for the registration and accreditation of interpreters (Action 2.2).

Access to Justice Advisory Committee *Access to Justice: an Action Plan* Australian Government Publishing Service Canberra 1994, 55.

ibid.

Women's Legal Resources Centre, Sydney *Submission 256*.

Confidential *Submission 78*; Sisters-in-law *Submission 195*; R Alexander, F Fomin, E Gray, C Lamble, K Robertson & S Panagiotidis *Submission 292*; Mt Pritchard Family Resource Centre NSW *Submission 329*; Anti-Discrimination Commissioner QLD *Submission 337*; J Blokland *Submission 347*; J Harrison *Submission 416*; Women's Electoral Lobby VIC *Submission 307*. See ALRC 67, para 2.20 and 4.38.

Confidential *Submission 292*.

Mt Pritchard Family Resource Centre NSW *Submission 329*.

North Queensland Combined Women's Services *Submission 275*.

R Alexander, F Fomin, M Fried, E Gray, C Lamble, K Robertson & S Panagiotidis *Submission 292*.

J Harrison *Submission 416*; J Waters *Submission 459*.

J Harrison *Submission 416*.

J Waters *Submission 459*.

Confidential *Submission 292*.

J Blokland *Submission 347*.

Confidential *Submission 572*.

J Waters *Submission 459*; R Alexander, F Fomin M Fried, E Gray, C Lamble, K Robertson & S Panagiotidis *Submission 292*; Sisters-in-law *Submission 195*.

J Harrison *Submission 416*.

Legal Aid Office ACT *Submission 294*.

J Waters *Submission 459*; Sisters-in-law *Submission 195*; Women's Electoral Lobby VIC *Submission 307*; Sexual Assault Referral Centre NT *Submission 540*; Centre Against Sexual Assault Inc Bendigo *Submission 11*.

Women's Electoral Lobby VIC *Submission 307*.

Confidential *Submission 426*; L Young *Submission 432*; Central Australian Advocacy Service *Submission 433*; K McNab *Submission 434*.

Illawarra Legal Centre NSW *Submission 284*.

ibid.

ibid.

Centre Against Sexual Assault, CASA House, Melbourne *Submission 197*; Illawarra Legal Centre NSW *Submission 284*; Domestic Violence Resource Centre, Woolloowin *Submission 295*; Domestic Violence Advocacy Service, Sydney *Submission 148*; Women's Legal Resources Centre, Sydney *Submission 256*.

Confidential *Submission 428*; J Lloyd & N Rogers 'Crossing the Last Frontier: Problems Facing Aboriginal Women Victims of Rape in Central Australia' in PW Eastal (ed) *Without Consent: Confronting Adult Sexual Violence: Proceedings of a Conference held 27-29 October 1992* Australian Institute of Criminology Canberra 1993.

For example in Western Australia the *Acts Amendment (Sexual Offences) Act 1992* (WA) s 106R states that the use of a support person, screens and closed circuit television may be used where the witness may 'suffer emotional trauma or be intimidated and distressed and unable to give evidence by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence or any other reason'. See also *Evidence Act 1958* (VIC) s 37C *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5; *Evidence Act (1977)* (Qld) s 21A; *Evidence Act 1989* (ACT) s 76D; *Evidence Act Amendment Act 1988* (SA) s 8; *Crimes (Personal and Family Violence) Amendment Act 1987* (NSW) s 77A.

Attorney-General for the Northern Territory *Sexual Abuse: Discussion Paper* Department of Law Northern Territory 1992.

K Thickens *Submission 556*.

Women's Information Service, Alice Springs *Consultation 23 August 1993*; Centre Against Sexual Assault, CASA House, Melbourne *Submission 197*; J Waters *Submission 459*; Tablelands Women's Centre QLD *Submission 114*.

Sexual Assault Referral Centre NT *Submission 540*; Illawarra Legal Centre NSW *Submission 284*; Mt Pritchard Family Resources Centre NSW *Submission 329*.

NSW Local Courts.

ibid.

J Waters *Submission 459*; Sexual Assault Referral Centre NT *Submission 540*; Tablelands Women's Centre Qld *Submission 114*.

[B]y the old common law, a husband was allowed to beat his wife with a stick no bigger than his thumb. He was able, Blackstone says, to give his wife "moderate correction" *Davis v Johnson* [1979] AC 264 at 271 per Lord Denning, citing *Blackstone's Commentaries* Vol 1 8th ed (1775) p 445.

R v LavallZe [1990] 1 SCR 852 at 872 per Madame Justice Bertha Wilson.

Both in its incidence (see National Committee on Violence Against Women, *National Strategy on Violence Against Women* Australian Government Publishing Service Canberra 1992, 2 for discussion of the under-reporting of violence against women and some indicators of the extent of the problem); and in the range of legal issues where it can arise.

Senate Standing Committee on Legal and Constitutional Affairs *Gender Bias and the Judiciary* Senate Printing Unit Canberra 1994.

ibid para 2.48.

ibid para 4.53.

See 'Commonwealth to Stamp Out Gender Bias in Law Curricula' Media Release from Minister for Employment, Education and Training 23 March 1994.

For example, through forced sterilisation and the use of dangerous contraceptive products and through forms of medical experimentation, such as the cervical cancer disaster in New Zealand. See S Coney *The Unfortunate Experiment* Penguin Auckland 1988.

See A Howe 'Sweet Dreams - Deinstitutionalising Young Women' in R Graycar (ed) *Dissenting Opinions: Feminist Explorations in Law and Society* Allen and Unwin Sydney 1990.

See S Brownmiller *Against Our Will* Penguin Harmondsworth 1976, 31-113. Recent events in Bosnia provide a graphic example of this: see CA MacKinnon, 'Turning Rape into Pornography: Postmodern Genocide' *Ms* July/August 1993, 24. An action has been commenced in the International Court of Justice for a declaration that the use of rape as a weapon in the conflict in the former Yugoslavia falls squarely within the terms of the Genocide Convention: *In the Matter of the Genocide Convention: Bosnia v Serbia and Montenegro*, to be heard in 1994: K Mahoney unpublished paper April 1994.

See R Graycar & J Morgan *The Hidden Gender of Law* Federation Press Sydney 1990, chapter 11.

The Supreme Court of Canada has recently developed this approach; see for example *Norberg v Wynrib* [1992] 2 SCR 318; *M (K) v M (H)* [1992] 3 SCR 6 (SCC).

See cases discussed in R Graycar & J Morgan *The Hidden Gender of Law* The Federation Press Sydney (1990), 347-352.

ibid 347 and see *Norberg v Wynrib* [1992] 2 SCR 318; *M (K) v M (H)* [1992] 3 SCR 6 (SCC).

Wilkinson v Downon Can [1897] 2QB 57.

J Conaghan 'Harassment and the Law of Torts: *Khorasandjian v Bush*' (1993) 1 *Feminist Legal Studies* 189; KM Stanton 'Harassment: An Emerging Tort?' (1993) 1 *Tort Law Review* 179, and Judge N Fricker QC 'Personal Molestation or Harassment: Injunctions in Actions Based on the Law of Torts' [1992] *Family Law* 158.

L Bender 'An Overview of Feminist Tort Scholarship' (1993) 78 *Cornell Law Review* 575 at 584; A Howe 'Social Injury' Revisited: Towards a Feminist Theory of Social Justice' (1987) 15 *International Journal of the Sociology of Law* 423.

Domestic homicides, generally perpetrated by men, form the largest single category of killings in Australia: see A Wallace *Homicide: The Social Reality* NSW Bureau of Crime Statistics and Research Sydney 1986. Similar trends have been noted in research undertaken by the Victorian Law Reform Commission. See also M Mahoney 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1.

Farmers' Cooperative Executors and Trustees Ltd v Perks (1989) 52 SASR 399 discussed by D Otto, 'A Barren Future: Equity's Conscience and Women's Inequality' (1992) 18 *Melbourne University Law Review* 808, and see other cases also discussed there.

However, the conviction for murder was set aside and a new trial ordered on the grounds that the trial judge had erred in directing the jury that intoxication was irrelevant and in using the term 'serious bodily harm' instead of 'grievous bodily harm'. The defendant's main case was that, notwithstanding the extensive history of his violence toward his wife, he had acted in self-defence. While the 'stormy relationship between them' was mentioned in the appeal judgments (at 339), its main focus was the fact that much of the 'violence which he frequently inflicted upon his wife was associated with an advanced state of intoxication' (at 338): see *R v Perks* (1986) 41 SASR 335.

(1989) 52 SASR 399 at 407-408.

(1989) 52 SASR 399 at 410.

See *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147. For the US equivalent, see *Riggs v Palmer* 115 NY 506; 22 NE 188 (1889).

[1992] 1 VR 583. Mrs Keitley was released after entering into a three year community based order.

id 584.

id 588. In the ACT, the *Forfeiture Act* 1991 enables a court to modify the forfeiture principle.

(1985) 2 NSWLR 188. This is discussed with other relevant cases in K Mackie 'Manslaughter and succession' (1988) 62 *ALJ* 616. See also J Stuckey-Clark 'the forfeiture rule' (1993) 67 *ALJ* 923. Compare however *Troja v Troja* (unreported) NSW Sup Ct 15 February 1993 where this approach was not taken. The criminal case in which Mrs Troja was convicted of manslaughter on the grounds of diminished responsibility after killing her husband is discussed by J Bergen & J Hunter 'Diminished responsibility: "abnormal" minds, abnormal murderers and what the doctor said' in SMH Yeo (ed) *Partial Excuses to Murder* The Federation Press Sydney 1991.

Diminished responsibility is a statutory partial defence to homicide in NSW which is not available in all Australian jurisdictions: see J Bergen & J Hunter 'Diminished responsibility: "abnormal" minds, abnormal murderers and what the doctor said' in SMH Yeo (ed) *Partial Excuses to Murder* The Federation Press Sydney 1991.

(1994) FLC 92-442 at 80,610.

(1994) FLC 92-442 at 80,617. See also *Re Boyce and Crowe* FLC 92-282 where the Family Court was asked to exercise its cross-vested jurisdiction so as to deal with letters of administration at the same time as an application for access on the part of a father who had killed his wife, for which he was convicted of manslaughter; and *Re K* Full Family Court 10 March 1994 - see chapter 9

Certainly, while there is little discussion of violence in personal injury cases, there are some reported Family Court decisions which, while they do not indicate the reason for the end of the relationship, make reference to the fact that one of the parties was injured, or concern the distribution of property which includes an award for *Griffiths v Kerkemeyer* damages (ie damages for the cost of care): see for example *O'Brien v O'Brien* (1983) FLC 91-316 (esp at 78,148 on the wife's post-accident care of the husband) and *Williams v Williams* (1984) FLC 91-541 (Fam Ct Full Ct); (1985) FLC 91-628 (H Ct).

Bruno v Davies (1988) 144 LSJS 226.

id 227.

id 236. See also R Graycar 'Women's Work: Who Cares?' (1992) 14 *Sydney Law Review* 86, 101-103 and references cited there.

Griffiths v Kerkemeyer damages. (1977) 139 CLR 161.

A clear illustration, in which the issue was presented as nervous shock, was *Spence v Percy* (1991) Aust Torts Rep 81-116, an unsuccessful action brought by the mother of the primary accident victim claiming damages for her (the mother's) injuries arising out of the original injury to her daughter.

See *Van Gervan v Fenton* (1992) 175 CLR 327 and for some discussion see R Graycar, 'Women's Work: Who Cares?' (1992) 14 *Sydney Law Review* 86 especially concerning the loss of amenity to the carer at 104-105; and 'Love's Labour's Cost: The High Court Decision in *Van Gervan v Fenton*' (1993) 1 *Torts Law Journal* 122.

Meah v McCreamer (No 1) [1985] 1 All ER 367 and *Meah v McCreamer (No 2)* [1986] 1 All ER 943; *W v Meah*; *D v Meah* [1986] 1 All ER 935.

R Graycar 'Violence in the Home: A Legal Response - A Limited Solution?' (1988) 26 *Law Society Journal* 46. See also the discussion of this phenomenon in R Graycar & J Morgan *The Hidden Gender of Law* The Federation Press Sydney (1990), 306 and references cited there.

See *Guide to the Administration of the Social Security Act, 1991* para 38.2561: 'A client may be granted exemption:

if he or she fears that if he or she takes action for child support the non-custodial parent will react violently toward the client or his or her family . . .'

See *Social Security Act* 1991 (Cth) s. 1234A; s.1224AB which refer to the involvement of others in the incurring of debts and permit recovery against a third person's payment where appropriate.

Personal communication to the ALRC from Brisbane Welfare Rights Centre.

For example, until June 1993 Ministerial directions made in July 1991 and May 1992 governed the exercise of the discretion to waive debts under s 1237. This direction has since been struck down by the Full Federal Court in *Riddell* (1993) 73 SSR 1067. Significantly, neither in the Ministerial direction nor in the re-enacted s.1237 and s.1237A, is violence mentioned as a factor to consider in exercising the discretion to waive a debt.

See for example *Gough v Commonwealth Bank of Australia* NSW Court of Appeal 31 May 1994.

Commercial Bank of Australia v Amadio (1983) 151 CLR 447.

These last three matters are the subject of some discussion in R Graycar & J Morgan *The Hidden Gender of Law* The Federation Press Sydney (1990), chapter 13.

Most violence against women is perpetrated by men known to them, men with whom they are or have been in intimate relationships. See Women's Policy Coordination Unit, Department of Premier and Cabinet *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence* Melbourne 1985, 12; National Committee on Violence *Violence: Directions for Australia* Australian Institute of

Criminology Canberra 1990, 33-34; National Committee on Violence Against Women *Position Paper* Australian Government Publishing Service Canberra 1992, 3.

811 Confidential *Submission* 8; Whitford Women's Health Centre, WA *Submission* 10; M Edwards *Submission* 14; T O'Brien *Submission* 65; R Rana *Submission* 72; Confidential *Submission* 83; Victims of Crime Service Inc *Submission* 142; S Owens *Submission* 149; Sisters-in-law *Submission* 195; Centre Against Sexual Assault, CASA House, Melbourne *Submission* 197; R Walker *Submission* 266; WEL Australia Inc *Submission* 281; Community Legal and Advocacy Centre, Fremantle *Submission* 289; Domestic Violence Resource Centre, Woolloowin QLD *Submission* 295; Mt Pritchard Family Resource Centre, NSW *Submission* 329; Attorney-General and Minister for Women's Affairs, VIC *Submission* 341; Confidential *Submission* 367; Confidential *Submission* 372 Confidential *Submission* 382; C Woodman *Submission* 430; Confidential *Submission* 463; Confidential *Submission* 476; Confidential *Submission* 480; Confidential *Submission* 481; North Queensland Combined Women's Service *Submission* 498; N Yakimova *Submission* 523; Confidential *Submission* 528, Confidential *Submission* 578.

812 The 'myths' of violence were described by Justice Moore in 'A judicial perspective on domestic violence in family law' *Paper* 'Challenging the legal system's response to domestic violence' *Conference* Brisbane 23-26 March 1994.

813 *ibid*; R Busch 'Hamilton Abuse Intervention Pilot Project' *Paper* 'Challenging the legal system's response to domestic violence' *Conference* Brisbane 23-26 March 1994.

814 This view has been informed by the National Committee on Violence Against Women: 'male violence against women is behaviour adopted to control the victim which results in physical, sexual and/or psychological damage, forced social isolation or economic deprivation or behaviour which causes women to live in fear'. See National Committee on Violence Against Women *National Strategy on Violence Against Women* Department of Prime Minister & Cabinet, Office of the Status of Women Canberra 1992, vii. See also National Committee on Violence *Violence: Directions for Australia* Australian Institute of Criminology Canberra 1990, 100-101; M Paymar 'Domestic assault: building a coordinated community response' *Paper* 'Challenging the legal system's response to domestic violence' *Conference* Brisbane 23-26 March 1994.

815 See Australian Law Reform Commission Report No 67 (Interim) *Equality before the law: women's access to the legal system* Sydney 1994 (ALRC 67) ch 3 for discussion of how violence against women is defined in international instruments such as the Declaration on Violence Against Women, General Assembly Resolution no 48/104 UNGA 48.

816 Confidential *Submission* 103.

817 L Jackson *Submission* 156.

818 R Walker *Submission* 266.

819 eg S Anchor *Submission* 143; Confidential *Submission* 50.

820 S Anchor *Submission* 143.

821 M Court, President of the Family Law Practitioners' Association (Tas) *Submission* 443.

822 Illawarra Legal Centre NSW *Submission* 284.

823 See K Funder et al *Settling Down: Pathways of Parents after Divorce* Australian Institute of Family Studies Melbourne 1993; discussed in ch 2.

824 Confidential *Submission* 8.

825 eg L Walker *The Battered Woman Syndrome* Springer New York 1984; Queensland Domestic Violence Task Force *Beyond These Walls* The Task Force Brisbane 1988, ch 2 & 3.

826 Women's Information Service, Alice Springs *Consultation* Alice Springs 24 August 1993; Confidential *Submission* 455 in which a resident of a women's shelter who had changed her name five times and made six moves in four years to escape a violent former partner spoke of her feeling of disempowerment through violence; Confidential *Submission* 411 concerning the feelings of personal isolation; Confidential *Submission* 441 which referred to the feelings of disempowerment caused both by the violence itself and by the law's perceived inability to deal with it.

827 R Walker *Submission* 266.

828 C Thompson *Submission* 47; Confidential *Submission* 305; Sensitive *Submission*; Confidential *Submission* 382; L Stidwell *Submission* 169; Domestic Violence Advocacy Service, Sydney *Submission* 148; Confidential *Submission* 463.

829 Sensitive *Submission* who reported that a Family Court Counsellor showed an unwillingness to believe both a mother and her child in relation to the father's violence and recommended unsupervised access. The submission considered that the counsellor had basic misconceptions, for example, that a woman asks for violence. In this instance the mother had been raped. Confidential *Submission* 426 referred to negative experiences with Family Court counsellors in the course of a prolonged custody dispute with an alcoholic father.

830 A Caselyr *Submission* 460, a medical practitioner, submitted that women who claim violence against them are simply not believed in the criminal trial process, and that rural women face particular credibility problems in the local town. For a discussion of the US experience see K Czapskiy 'Domestic violence, the family, and the lawyering process: lessons from studies on gender bias in the courts' (1993) 27 *Family Law Quarterly* 247.

831 See for example Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its Operation and Interpretation* Australian Government Publishing Service Canberra 1992, 147-148 which quotes a submission from the Lone Fathers Association Australia (WA Branch) stating that '(i)t is not uncommon for such custodial parents to obtain restraining order in order to make pre-emptive strikes against their unsuspecting ex-spouses, to circumvent access awards made by the Family Court and to hurt the ex-spouse as much as possible - with utter disregard for their children's feelings.' The Committee concluded that improved coordination between the Family Court and the relevant State court which issues orders for personal protection 'may help to reduce the incidence of inappropriate orders being issued by either court.' The Committee also referred to submissions indicating that some magistrates request information about access arrangements before granting protection orders, causing some women to negotiate access agreements with violent partners outside the courtroom.

832 See R Busch 'Judicial Decisions on Domestic Violence' *Paper* 'Challenging the legal system's response to domestic violence' *Conference* Brisbane 23-26 March 1994.

833 S Anchor *Submission* 143.

834 Confidential *Submission* 50.

835 *Matrimonial Causes Act* 1959 (Cth) s 28. Grounds also included separation for a continuous period of at least five years.

836 See generally NA Katter *Conduct, Fault and Family Law* Law Book Co Sydney 1987.

837 *Family Law Act* 1975 (Cth) s 48.

838 *In the Marriage of Heidt* (1976) 1 Fam LR 11,576; *ReKress* (1976) 2 Fam LR 11,330.

839 *In the Marriage of Soblusky* (1976) 12 ALR 699, applied in *Issom and Issom* (1977) FLC 90,238.

840 *In the Marriage of Ferguson* (1978) 4 Fam LR 312.

841 Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *Family Law in Australia* Australian Government Publishing Service Canberra 1980, Vol 1, 81.

842 See para 9.57-9.62.

843 J Behrens 'Domestic violence and property adjustment: a critique of "no fault" discourse' (1993) 7 *Australian Journal of Family Law* 9, 13.

id 9.
id 24.
National Committee on Violence Against Women *NCVAW Submission to the Joint Select Committee on certain aspects of the operation and interpretation of the Family Law Act Part 1* at 12.
Family Law Act 1975 (Cth) s 63E(2).
Family Law Act 1975 (Cth) s 63E(1). This includes such matters as the right to make decisions about the child's schooling, change of residence, serious operations and religious upbringing.
Family Law Act 1975 (Cth) s 64(1).
Family Law Act 1975 (Cth) s 64(1)(bb)(va).
eg *In the Marriage of Heidt* (1976) 1 Fam LR 11, 576.
(1981) FLC 91-008.
ibid 76, 107.
Under the law as it was prior to amendments in 1983 which specified the consequences of custody and guardianship - see *Family Law Amendment Act 1983* (Cth).
See P Parkinson 'Children who witness violence' *Paper 'Families and violence' Conference* Macquarie University Sydney 4-5 February 1994. Confidential *Submission 83*.
C Woodman *Submission 430*.
See P Parkinson 'Children who witness violence' *Paper 'Families and Violence' Conference* Macquarie University Sydney 4-5 February 1994; Family Violence Professional Education Taskforce *Family Violence: Everybody's Business, Somebody's Life* The Federation Press Sydney 1991, 210-214.
A Blanchard et al 'I just couldn't stop them' *Western Australian children living with domestic violence: a study of the children's experiences and service provision* Office of the Family WA 1992, 15; A Blanchard 'Effects of family violence in childhood on adults' *Paper 'Families and Violence' Conference* Macquarie University Sydney 4-5 February 1994; P Mertin & J Mathias *Children of domestic violence: effects on behavioural, emotional and psychosocial functioning* Department of Family and Community Services SA 1991; see also review in MD Butterworth & KA Fulmer 'The effect of family violence on children: intervention strategies including bibliotherapy' (1991) 12(3) *Australian Journal of Marriage and Family* 170, 172-174; P Jaffe et al 'Children's observations of violence: critical issues in child development and intervention planning' (1990) 35(6) *Canadian Journal of Psychiatry* 466; J Harrison 'How can the Family Court be made more relevant to the community?' *Paper 'Challenging the legal system's response to domestic violence' Conference* Brisbane 23-26 March 1994. For a view on the damage to children of continuing access where there is conflict between the parents see J Goldstein et al *Beyond the Best Interests of the Child* Free Press New York 1973 and J Goldstein et al *Before the Best Interests of the Child* Burnett Books London 1980.
BE Carlson 'Children's observations of interpersonal violence' in AR Roberts (ed) *Battered Women and Their Families* Springer New York 1984 cited in J Harrison 'How can the Family Court be made more relevant to the community?' *Paper 'Challenging the legal system's response to domestic violence' Conference* Brisbane 23-26 March 1994.
MD Butterworth & KA Fulmer 'The effect of family violence on children: intervention strategies including bibliotherapy' (1991) 12(3) *Australian Journal of Marriage and Family* 170, 172
See generally D Kalmuss 'The inter-generational transmission of marital aggression' (1984) 46 *Journal of Marriage and the Family* 11 cited in J Harrison 'How can the Family Court be made more relevant to the community?' *Paper 'Challenging the legal system's response to domestic violence' Conference* Brisbane 23-26 March 1994; Z Hilton 'Battered women's concerns about their children witnessing wife assault' (1992) 7(1) *Journal of Interpersonal Violence* 77; P Jaffe et al 'Children's observations of violence: critical issues in child development and intervention planning' (1990) 35(6) *Canadian Journal of Psychiatry* 466, 471.
National Committee on Violence *Violence: Directions for Australia* Australian Institute of Criminology Canberra 1990, 103.
ibid.
ibid.
id Recommendations 9, 11, 37.
Illawarra Legal Centre NSW *Submission 284*.
M Edwards *Submission 14*.
R Walker *Submission 266*.
J Church *Violence against wives: its causes and effects: results of the Christchurch Family Violence Study* Christchurch 1984, ch 8 & 10; C Woodman *Submission 430* said that forcing access to a violent father can damage the relationship between mother and child.
SE Hartland & MR Brassard 'A major threat to children's mental health: psychological maltreatment' (1987) 42 *American Psychologist* 160. Cited in J Harrison 'How can the Family Court be made more relevant to the Community?' *Paper 'Challenging the legal system's response to domestic violence' Conference* Brisbane 23-26 March 1994.
Keys Young *Violence against women and children* Report No 4 'National Symposium on Alcohol Misuse and Violence' 1-3 December 1993 Canberra, 37. This was a NSW survey of 58 women who had been subjected to domestic violence. 47 of those women had children.
Young v Young 19 RFL (3d) 227. This decision was described as a major departure from case law by the Law Society of British Columbia in *Gender equality in the justice system* Law Society of British Columbia 1992, Recommendation 5.53.
id Recommendation 5.38.
Family Law Act 1975 (Cth) s 64(1)(b)(iii).
See for example *F and N* (1987) FLC 91-813; *Power and Power* (1988) FLC 91-911. However the Full Court has held that there is a greater obligation on a trial judge to make positive findings and to give reasons where the effect of the judgment is to change a long-standing arrangement: *Towns and Towns* (1991) FLC 92-199.
Moore J 'A judicial perspective on domestic violence in family law' *Paper 'Challenging the legal system's response to domestic violence' Conference* Brisbane 23-26 March 1994. Confidential *Submission 578*.
See the decision of the Full Court of the Family Court in *In the Marriage of Brown and Pedersen* (1991) 15 Fam LR 173 approving *Re A* (1982) FLC 91-284 and *Cotton and Cotton* (1983) FLC 91-330.
Confidential *Submission 462*; Confidential *Submission 8*; Mt Pritchard Family Resource Centre NSW *Submission 329*; Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*.
See T Roxburgh *Taking control: help for women and children escaping domestic violence* Greenhouse Victoria 1989, 155 where it was stated that one of the most important reasons why the court does not often deny access is that 'many solicitors and barristers will go to almost any length to convince you that you cannot deny access and (a woman) must therefore agree to it before (going) into court and it can be almost impossible to have them obey . . . instructions and oppose the application.' See also Moore J 'A judicial perspective of domestic violence in family law' *Paper 'Challenging the legal system's response to domestic violence' Conference* Brisbane 23-26 March 1994.
Delegates at the 'Challenging the legal system's response to domestic violence' *Conference* Brisbane 25 March 1994.
Sensitive *Submission*.
Illawarra Legal Centre NSW *Submission 284*.

See NR Cahn 'Civil images of battered women: the impact of domestic violence in child custody decisions' (1991) 44 *Vanderbilt Law Review* 1041.

Family Law Council *Letter of advice to the Attorney-General on the operation of the (UK) Children Act 1989* Family Law Council 1994.

See *Hughes and Hughes* (1980) FLC 90-869 where access was denied to a father after he had collected the child for access and failed to return her to her mother. Eight months later, the father was arrested and the child returned. Baker J (at 75,507-75,508) stated 'As a statement of general principle, I am firmly of the view:

- (a) that if the conduct of the non-custodial parent during access periods has the effect of undermining the stability of the relationship between the child and the custodial parent, or
- (b) that there is a real risk or likelihood that such conduct will occur, or
- (c) that there is a likelihood or real possibility that orders governing conditions of access will either be flouted or ignored by the non-custodial parent without regard to the effect upon the child or the child's relationship with the custodial parent,

then the court must protect the ongoing relationship between the custodial parent and the child particularly where that relationship is both emotionally stable and environmentally secure, by suspending access or in an appropriate case refusing access altogether.'

See para 9.33-9.37.

The term 'protection order' is used to mean an order under State or Territory legislation for the protection of individuals from violence in the home. In different jurisdictions they are referred to as apprehended violence orders, intervention orders, restraining orders, restraint orders or injunctions. See *Domestic Violence Act 1986* (ACT); *Crimes Act 1900* (NSW); *Justices Act* (NT); *Domestic Violence (Family Protection) Act 1989* (Qld); *Summary Procedure Act 1921* (SA); *Justices Act 1959* (TAS); *Crimes (Family Violence) Act 1987* (VIC); *Justices Act 1902* (WA).

Confidential *Submission 455*; D Barclay *Submission 419*; A Caselyr *Submission 466*; Illawarra Legal Centre NSW *Submission 284*.

Because of the operation of section 109 of the *Constitution*, where they cover the same field.

Illawarra Legal Centre NSW *Submission 284*.

For example Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its Operation and Interpretation* Australian Government Publishing Service Canberra 1992, Recommendation 42 which stated that police stations should only be used as a last resort provided strict requirements such as the availability of suitable staff were met.

Confidential *Submission 8*.

Lone Fathers Association WA *Submission 598*; Confidential *Submission 217*; Confidential *Submission 8*; Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*.

In March 1994 it was reported that only three access centres were operating in Australia: Ozanam Village in Sydney, Toowoomba Legal Service in Queensland and a centre operated by Anglicare in West Perth: see J Harrison 'How can the Family Court be made more elvant to the community?' *Paper 'Challenging the legal system's response to domestic violence' Conference* Brisbane 23-26 March 1994. There is little material evaluating these services. An independent evaluation of a handover service which operated at the Adelaide Central Mission in 1983-84 recommended its continued funding but this was refused: see M Mune *Access handover: an evaluation of the access-handover services at the Adelaide Central Mission* South Australian Institute of Technology 1984.

Bethany Child and Family Support VIC *Submission 144* to the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975, 1992; Darwin Family Visiting Centre Steering Committee Darwin 1994.

M Mune *Access handover: an evaluation of the access-handover services at the Adelaide Central Mission* South Australian Institute of Technology 1984, 5, Recommendation 2. See also Family Court of Australia *Submission to the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975* 1992 vol (b), 38.

RB Straus & E Alda 'Supervised child access: the evolution of a social service' (1994) 32 *Family and Conciliation Courts Review* 230, which refers to 59 members of the Supervised Visitation Network in 17 States. Most of those services have existed for less than three years.

Child Safety Bill (US) introduced into the House of Representatives on 30 June 1993.

The cost was one of the reasons the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975 was reluctant to support them. See Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its Operation and Interpretation* Australian Government Publishing Service Canberra 1992 para 6.57.

See also Family Court of Australia *Submission to the Joint Select Committee on certain aspects of the operation and interpretation of the Family Law Act 1992* vol(b) 36-38.

Family Law Act 1975 (Cth) s 65.

Family Court of Australia *Family Court guidelines for separate representatives appointed pursuant to s 65*.

Re K (unreported) 10 March 1994, Full Court of the Family Court Melbourne, 34 referring to the Family Law Council *Representation of children in family law proceedings* Australian Government Publishing Service Canberra 1989.

Family Court of Australia *Submission to the Joint Select Committee on certain aspects of the operation and interpretation of the Family Law Act 1992* vol(b) 54. In that submission the Court stated that separate representation would usually be provided where there are allegations of child abuse, anti-social conduct which seriously impinges on the child's welfare or 'apparent intractable conflict' between the parents.

Re K (unreported) 10 March 1994 Full Court of the Family Court Melbourne, 39. The Family Law Council (Child's Representatives) Committee is investigating the issue.

id 40-48.

id 41.

id 44.

Convention on the Civil Aspects of International Child Abduction 1980. The Convention is given effect to in Australia by the *Family Law (Child Abduction Convention) Regulations* (1987).

Family Law (Child Abduction Convention) Regulations (1987) reg 16(3).

Family Law (Child Abduction Convention) Regulations (1987) reg 16(3)(c) and (d).

Gsponer v Director General Department of Community Services Vic (1989) FLC 92-001.

Family Law Act 1975 (Cth) s 64(1). See *In the Marriage of Schenck* (1981) 7 Fam LR 170.

B and B (Kidnapping) (1986) FLC 91-749.

In the Marriage of Barrios and Sanchez (1989) 13 Fam LR 477.

Gsponer v Johnstone (1988) 12 Fam LR 755; *In the Marriage of Antoniou* (1990) 14 Fam LR 90; *In the Marriage of Gollogly and Owen* (1989) 13 Fam LR 622; *Murray v Director of Family Services ACT* (1993) FLC 92-416; *In the Marriage of McOwan* (1993) 17 Fam LR 377.

Confidential *Submission 492*; Confidential *Submission 487*; discussions by the Commission with State contracting authorities.

Gsponer v Director General, Department of Community Services Vic (1989) FLC 92-001.

In the Marriage of McOwan (1993) 17 Fam LR 377, 383.

The Full Court noted that the trial judge had commented 'that it was not possible to determine the veracity of these allegations and that most of the evidence in relation to them would only be available in New Zealand'(at 80,248). It noted that the 'applicant' under the regulations was

the New Zealand Department of Justice and that the children would be returned to it, not the husband. It also noted that the issue in a Hague Convention application was one of forum (subject to exceptions set out in regulation 16), and that there was no conflict with the welfare principle under s 64(1).

Murray v Director Family Services ACT (1993) FLC 92-416, 80,259-80, 260 per Nicholson CJ and Fogarty J.

See para 9.16-9.20.

Police Commissioner of SA v Temple (No 2) 1993 FLC 92-424, 80, 363.

Family Law Act 1975 (Cth) s 75(2).

Family Law Act 1975 (Cth) s 79(4). See Australian Law Reform Commission Report No 39 *Matrimonial property* Australian Government Publishing Service Canberra 1987 (ALRC 39) para 58-62.

In the Marriage of Soblusky (1976) 12 ALR 699; *In the Marriage of Ferguson* (1978) 4 Fam LR 312; *Symthe and Symthe* (1983) FLC 91-337; *In the Marriage of Fisher* (1990) 13 Fam LR 806. *Soblusky* is seen as the current authority on the relevance of past misconduct: see para 9.9.

J Behrens 'Domestic violence and property adjustment: a critique of "no fault" discourse' (1993) 7 *Australian Journal of Family Law* 9. She argues that despite the clear relevance of violence to 'contributions' and 'needs' under the current criteria, judicial conventions have developed under which it is generally ignored.

ibid 16.

Kowaliw and Kowaliw (1981) FLC 91-092; *Mead and Mead* (1983) FLC 91-354 where the husband received nothing after his gambling was taken into account; *Krotofil and Krotofil* (1980) FLC 90-909 and *Weber v Weber* (1976) FLC 90-072 where one party's alcoholism was taken into account in reducing the share of the property; *Barkley v Barkley* (1977) FLC 90-216 where a husband's assault deafened his wife and was taken into account in respect of her health (s 75(2) (a)) and her capacity for employment (s 75(2)(b)); *Tye and Tye (No 2)* (1976) FLC 90-048 where it was determined that the husbands' premeditated desertion had caused his wife's nervous breakdown and was consequently taken into account, as compared with *Rogers and Rogers* (1980) FLC 90-874 where the Court discounted the evidence of the husband's alleged assaults because there was no evidence that they had had any lasting ill-effects or that they had impaired the wife's earning capacity or had involved expenditure.

See *Sheedy v Sheedy* (1979) FLC 90-719 where Nygh J stated in relation to allegations of the husband's misconduct under s 79(4)(b), 'It is clearly not sufficient merely to allege misconduct and expect the court to draw the inference therefrom that his misconduct resulted in a non-contribution. It is perfectly possible for one spouse to be personally obnoxious to the other and yet be an adequate homemaker and parent.'

See para 9.16-9.19.

Family Law Act 1975 (Cth) s 75(2).

Family Law Act 1975 (Cth) s 75(2)(a); see for example *Barkley v Barkley* (1977) FLC 90-216 where the husband's assault deafened his wife.

Family Law Act 1975 (Cth) s 75(2)(b).

Family Law Act 1975 (Cth) s 75(2)(k).

Family Law Act 1975 (Cth) s 75(2)(o).

(1984) 156 CLR 506.

Australian Law Reform Commission Report No 39 *Matrimonial property* Australian Government Publishing Service Canberra 1987 (ALRC 39).

ibid para 363.

id para 364-373.

id para 375.

The Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: aspects of its operation and interpretation* Australian Government Publishing Service Canberra 1992 recommendations 71 & 74. The Government Response to that report agreed in principle: Attorney-General *Family Law Act 1975: Directions for amendment* Australian Government Publishing Service Canberra 1993, 40-41.

Attorney-General *Family Law Act 1975: Directions for amendment* Australian Government Publishing Service Canberra 1993, 41.

Justice Elizabeth Evatt dissents from this recommendation to the extent that it covers non-financial contributions. In her view the equality principle makes it unnecessary to include non-financial contributions except perhaps where violence may be relied on to counter the argument of a substantially greater contribution by the other party.

Following a referral of power to the Commonwealth between 1987 and 1990 from all States except Western Australia, the Family Court has jurisdiction over matters relating to maintenance, custody, guardianship and access for all children, including those from a de facto relationship.

The Family Court can exercise jurisdiction under cross-vesting legislation to apply State laws, but it seldom chooses to do so. See *Re Chapman and Jansen* (1990) 13 Fam LR 853; *Kenda v Johnston* (1992) 15 Fam LR 369. See also *Broman and Clarke* (1989) 13 Fam LR 676, where it was held that in the interests of justice it was appropriate that an application for property settlement, which would normally be a State matter, should be dealt with in the Family Court in conjunction with child maintenance and custody matters.

Tasmania, Queensland, WA and SA, although proposals for reform have been developed in two of those jurisdictions (Qld, WA, ACT).

Property Law (Amendment) Act 1987 (VIC).

De Facto Relationships Act (1984) (NSW); *De Facto Relationships Act* (1991) (NT); *Property Law (Amendment) Act* (1987) (VIC).

Confidential Submission 441.

Australian Law Reform Commission Report No 57 *Multiculturalism and the law* Sydney 1992 (ALRC 57) para 5.26.

Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its Operation and Interpretation* Australian Government Publishing Service Canberra 1992, Recommendations 85-87. The Government Response to that report agreed in principle: Attorney -General *Family Law Act 1975: Directions for amendment* Australian Government Publishing Service Canberra 1993, 43-44.

Attorney-General *Family Law Act 1975: Directions for amendment* Australian Government Publishing Service Canberra 1993, 43.

Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth and all States and Territories).

Marsh v Marsh (1994) FLC 92-443. Coleman J made strong statements about the husband's violence against his wife (at 80,625): 'The conduct of the respondent was completely and totally unjustified and excessive, involving as it did serious domestic violence . . . This is a case where the message must be spelled out to persons such as the respondent that they cannot assault and beat wives or de facto wives and escape civil liability simply on the basis that it was a domestic. I know of no principle which renders an assault and battery in a domestic context less reprehensible than in any other context.'

(unreported) 18 April 1994 Family Court of Australia Melbourne per Brown J.

Senate Standing Committee on Constitutional and Legal Affairs *Report on the law and administration of divorce and related matters and the clauses of the Family Law Bill 1974* Parliamentary Paper No 133 1974, para 34-35.

id para 62.

Family Law Act 1975 (Cth) s14, 16A, 61B.

For example the establishment of community justice centres in NSW in 1980 and similar developments in other States during the 1980s; and the growth of arbitration in commercial disputes since the late 1970s. For discussion see H Astor & CM Chinkin *Dispute Resolution in Australia* Butterworths Sydney 1992, ch 1.

Family Law Act 1975 (Cth) Part IIIA, inserted by the *Courts (Mediation and Arbitration) Act 1991* (Cth). See para XR for discussion.

Attorney-General *Family Law Act 1975: directions for amendment* Australian Government Publishing Service Canberra 1993, 10; Australian Government *Portfolio Budget Measures Statements 1994-95: Attorney-General's Portfolio* Budget Related Paper No 4.1 Canberra 1994, 25.

See H Astor & CM Chinkin *Dispute Resolution in Australia* Butterworths Sydney 1992, ch 2.

R Alexander 'Mediation' *Paper 'Challenging the legal system's response to domestic violence'* Conference Brisbane 23-26 March 1994; H Astor 'Feminist issues in ADR' (1991) 65 *Law Institute Journal* 69. One study has found that the method used by spouses to resolve property and financial matters had a marked impact on the distribution of matrimonial assets. Where the parties used a 'low level' legal process (such as a settlement reached after no or minimal legal advice), the marital home was markedly more likely to be sold and the money divided. The home was much more likely to be transferred to the wife when a 'higher level' process (such as litigation) was used. It was also more common for women to receive a smaller share of the marital assets (less than 40%) when a 'low' rather than 'high' level process had been used. Australian Institute of Family Studies *Settling Up: Property and Income Distribution on Divorce in Australia* Prentice-Hall Sydney 1986, 48-51.

K Mack *Submission 48*; Gosnells District Information Centre Inc *WA Submission 186*; S Anchor *Submission 143*; Victims of Crime Service Inc *SA Submission 142*.

GR Clarke & IT Davies 'Mediation - when is it not an appropriate dispute resolution process?' (1992) 3 *Australian Dispute Resolution Journal* 70; H Astor & CM Chinkin *Dispute Resolution in Australia* Butterworths Sydney 1992, 257-260; H Astor 'Violence and family mediation: policy' (1994) 8(1) *Australian Journal of Family Law* 3; S Gribben 'Violence and family mediation: practice' (1994) 8(1) *Australian Journal of Family Law* 22.

R Alexander 'The response of Commonwealth law to wife-battering' (1987-88) 2 *Australian Journal of Family Law* 240.

Family Court of Australia *Chief Justice's Direction as to the Management of Cases Involving Family Violence* 15 January 1993

For discussion of these differences see E Renouf 'Family conciliation/mediation in Australia: which way forward?' (1990-91) 2 *Australian Dispute Resolution Journal* 108.

Family Law Act 1975 (Cth) s15, 61.

Family Law Act 1975 (Cth) s 79(9); Family Law Rules Order 24. The Rules do not specify the procedures to be followed.

See para 9.61-9.62.

See para 9.65-9.67.

Family Law Act 1975 (Cth) Pt 111A Div 2.

Family Law Act 1975 (Cth) s 16A, s 61B.

H Astor & CM Chinkin *Dispute Resolution in Australia* Butterworths Sydney 1992, 245.

Family Law Act 1975 (Cth) s 62.

Family Law Act 1975 (Cth) s 64(1B).

Family Law Act 1975 (Cth) s 62A.

N Eason *Submission 539*; Victims of Crime Service Inc *SA Submission 142*; Centre Against Sexual Assault, CASA House, Melbourne *Submission 197*; Outer East Domestic Violence Outreach Service Collective Inc *VIC Submission 249*; Central Australian Advocacy Service *Submission 433*; Confidential *Submission 455*; Confidential *Submission 528*; E Ling *Submission 461*; Confidential *Submission 462*; L Intemann *Submission 296*.

See para 9.7.

N Eason *Submission 539*; S Anchor *Submission 143*; L Jackson *Submission 156*; Confidential *Submission 103*.

N Eason *Submission 539*; Confidential *Submission 426*; T O'Brien *Submission 65*.

Sensitive *Submission*.

Workshop on counselling at 'Challenging the legal system's response to domestic violence' Conference Brisbane 25 March 1994.

Victims of Crime Service Inc *SA Submission 142*.

S Anchor *Submission 143*.

Family Court of Australia *Family Court counselling service: family violence policy and guidelines* (1993) para 1.17. The guidelines also provide that 'clients who have been subjected to violence have the right to make their own choices about what is realistic for them and their choices should be respected' (para 1.16).

Confidential *Submission 103*.

Confidential *Submission 50*.

For example Confidential *Submission 442* which spoke of Family Court Registrar's conferences in property proceedings as particularly disempowering and coercive where violence has been experienced.

N Eason *Submission 539*.

Sensitive *Submission*.

Family Court of Australia *Family Court Counselling Service: Family violence policy and guidelines*. See for instance 2.1. Where counselling has been ordered by the Court the Counsellor should read the file (where possible) before the appointment with a view to determining whether or not there have been allegations of family violence.

id para 4.0.

Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its operation and interpretation* Australian Government Publishing Service Canberra 1992, Recommendation 6. The report also recommended that the Director of Family Court Counselling take all necessary steps to ensure that the domestic violence policies be translated into consistent practice in all registries (Recommendation 11).

Courts (Mediation and Arbitration) Act 1991 (Cth).

The pilot program was set up in the Melbourne Registry in January 1992 (also in the Dandenong Registry). It was extended to Sydney in 1993.

Australian Government *Budget Related Paper No 4.1, Portfolio Budget Measures Statement 1994-95 Attorney-General's Portfolio* Australian Government Publishing Service Canberra 1994. The Family Court received an extra \$4.78M over four years. A preliminary evaluation of the pilot mediation program in Melbourne and Dandenong was carried out between 1 April 1992 and 31 March 1993. Most cases involved property disputes with half involving both property (including maintenance) and children. About 79% of clients in the sample were assessed as experiencing moderate to high relationship conflict. 24% of those cases which were mediated still involved violence or threatening behaviour. The overall agreement rate was high (82%) and the level of satisfaction with the process was also high, with 87% of clients reporting that the decision reached in mediation was a fair one. Follow-up interviews an average of seven months later confirmed that 90% of the agreements were in place and working. See S Bordow & J Gibson *Evaluation of the Family Court mediation service* Family Court of Australia 1994; B Robertson 'Mediation comes to the Family Court in Sydney' (1993) 31(10) *Law Society Journal* 33.

H Astor *Guidelines for use if Mediating in Cases Involving Violence Against Women* (prepared for the National Committee on Violence Against Women) Office of the Status of Women, Department of Prime Minister and Cabinet 1992.

Family Law Council *Family Mediation* Australian Government Publishing Service Canberra 1992 para 3.34.

T Gee & P Urban 'Co-mediation in the Family Court' (1993) 5(1) *Australian Dispute Resolution Journal* 42.

Chief Justice Nicholson *Consultation* 3 March 1994.

H Astor *Guidelines for use if mediating in cases involving violence against women* (prepared for the National Committee on Violence Against Women, Office of the Status of Women, Department of the Prime Minister and Cabinet 1992, 13.

All States and Territories now have some type of order for protection from violence: see para 9.31.

Injunctions are available under the *De Facto Relationships Act* NSW (1984) s 53.

Family Law Act (1975) (Cth) s 70C.

Family Law Act (1975) (Cth) s 114.

For example see *Kemsley and Kemsley* (1984) FLC 91-567 where the Full Court of the Family Court acknowledged (at 79,590) that '(a)n order might be for the personal protection of the wife if it prevented the husband from interfering with her employment or business or her social life or if it were designed to safeguard her mental or emotional well-being'. In *Wilmoth and Wilmoth* (1981) FLC 91-030 the husband was restrained from taking further custody and access proceedings in the interests of his wife's health and well-being.

Family Law Act (1975) (Cth) s 114(1)(e) & (f).

See P Waters 'The Family Court and domestic violence: more of the rack and less of the rubric' in SE Hatty (ed) *National Conference on Domestic Violence: Proceedings 11-15 November 1985* Australian Institute of Criminology Canberra 1986, Vol 2 547; see also discussion in Australian Law Reform Commission Report No 35 *Contempt* Australian Government Publishing Service Canberra 1987 (ALRC 35) para 656-664.

Family Law Amendment Act (1989) (Cth).

Family Law Act (1975) (Cth) Pt XIII A and XIV.

See HA Finlay et al *Family law: cases, materials & commentary* Butterworths Sydney 1993, 858-860, 868-870; N Seddon *Domestic Violence in Australia: The Legal Response* (2nd edition) Federation Press Sydney 1993, ch 3; J Harrison 'How can the Family Court be made more relevant to the community?' *Paper Challenging the legal system's response to domestic violence Conference*, Brisbane 23-26 March 1994.

M Court *Submission 443* who stated that many lawyers considered that Family Court injunctions are simply not seen as a practicable remedy against violence; J Harrison *Submission 416* who spoke of the ineffectiveness of injunctions and the continuing tendency of the Family Court to underrate domestic violence; Domestic Violence Legal Help, Darwin *Submission 422* which pointed to the difficulties of ensuring that State and Territory police enforce the injunctions and argued that the Family Law Act's decriminalisation of violence reduces its seriousness. Domestic Violence Legal Help *Submission 309*.

Legislation has been enacted to create an offence of 'stalking' in NSW, SA and Queensland, and is under consideration in Victoria. See *Crimes (Domestic Violence) Amendment Act 1993* (NSW); *Criminal Law Amendment Act 1993* (QLD); *Criminal Law Consolidation (Stalking) Amendment Act 1994* (SA).

Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its Operation and Interpretation* Australian Government Publishing Service Canberra 1992, para 7.131, Recommendation 60.

id para 7.124-7.133.

Following amendments to *Family Law Act 1975* (Cth) s 70D and 114AA in 1989, by virtue of *Family Law Amendment Act* (1989) (Cth).

48 hours if a Sunday or public holiday.

Queensland Police and Police Commissioners Advisory Group *Submissions* to the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its Operation and Interpretation* Australian Government Publishing Service Canberra 1992, para 7.129-7.131.

id Recommendations 61 & 62.

The Joint Select Committee Report contained a number of recommendations aimed at this problem. They included such recommendations as the establishment of a database for Family Court orders, accessible by the police and improved mechanisms for the regular exchange of information between the Court and the police: see Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its Operation and Interpretation* Australian Government Publishing Service Canberra 1992, Recommendations 50-55.

Schwarzkopff and Schwarzkopff (1992) FLC 92-303.

Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its Operation and Interpretation* Australian Government Publishing Service Canberra 1992, para 7.110.1.

id Recommendations 58 & 59.

Australian Law Reform Commission Report No 35 *Contempt* Australian Government Publishing Service 1987 (ALRC 35) para 671. Its recommendation related to a wilful breach of an order under s 114(1)(a), (b) or (c), that is, an order for personal protection or an order which restrains a party from entering the other's home or place of work. See also J Harrison 'How can the Family Court be made more relevant to the community?' *Paper 'Challenging the legal system's response to domestic violence' Conference* Brisbane 23-26 March 1994; N Seddon *Domestic Violence in Australia: the Legal Response* (2nd edition) Federation Press Sydney 1993, 73.

At present, even where police arrest the man for breach of the Family Court order, he must be released if there is no application before the court by the other party: *Family Law Act* (1975) s 114AA(4).

See Australian Law Reform Commission Report No 67 (Interim) *Equality before the law: women's access to the legal system* ALRC Sydney 1994 (ALRC 67), ch 2 & 3.

Confidential *Submission 455* concerning the inadequacy of police training in domestic violence, a problem which is particularly acute in rural areas, and the fact that police often advise women not to press charges; Confidential *Submission 411* where women from a women's refuge complained that breaches are simply not dealt with effectively by police who do not see domestic violence as real criminal conduct; Confidential *Submission 103*; Domestic Violence Legal Help, Darwin *Submission 422*; Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*.

For example the inability of protection orders to deal with 'stalking': A Caselyr *Submission 460*; E Ling *Submission 461*.

Domestic Violence Legal Help, Darwin *Submission 422* referring to a loss of faith among lawyers and victims due to perceived inadequate penalties for breach of restraining orders.

eg Confidential *Submission 426* commented that in Alice Springs police sometimes show better training in and appreciation of domestic violence than legal practitioners; Confidential *Submission 103*.

Community Legal and Advocacy Centre, Fremantle *Submission 6*. See para ch 5 & 7.

Protection Orders (Reciprocal Arrangements) Act 1992 (ACT); *Crimes (Family Violence) (Further Amendments) Act 1992* (Vic); *Justice Legislation Amendment (Domestic Violence) Act 1992* (Tas); *Summary Procedure (Summary Protection Order) Amendment Act 1992* (SA); *Domestic Violence Act 1992* (NT).

See National Committee on Violence Against Women *The effectiveness of protection orders in Australian jurisdictions* Australian Government Publishing Service Canberra 1993.

See Australian Law Reform Commission Report No 67 (Interim) *Equality before the law: women's access to the legal system* ALRC Sydney 1994 (ALRC 67), ch 3.

M Paymar 'Domestic assault: building a coordinated community response' *Paper 'Challenging the legal system's response to domestic violence' Conference* Brisbane 23-26 March 1994.

Hamilton in New Zealand: see R Busch 'Hamilton abuse intervention pilot project' *Paper 'Challenging the legal system's response to domestic violence' Conference* Brisbane 23-26 March 1994.

The Duluth model is being introduced in NT, was briefly trialled in WA and is being discussed in Queensland and Tasmania.

ibid.

See National Committee on Violence *Violence: Directions for Australia* Australian Institute of Criminology Canberra 1990, 186-189, recommendations 64-68; J Mugford et al *ACT Domestic Violence Research: Report to the ACT Community Law Reform Committee* (Community Law Reform Committee of the ACT Research Paper No 1 *Domestic Violence*) Australian Institute of Criminology Canberra 1993, 241-243, Recommendation 13; Family Violence Professional Education Taskforce *Family Violence: Everybody's Business, Somebody's Life* Federation Press Sydney 1991, 190-191.

eg see Family Violence Professional Education Taskforce *Family Violence: Everybody's Business, Somebody's Life* Federation Press Sydney 1991, 192-194.

eg National Committee on Violence Against Women *The effectiveness of protection orders in Australian jurisdictions* AGPS Canberra 1993, 56-57; J Stubbs 'The effectiveness of protection orders - a national perspective' *Paper 'Challenging the legal system' 'Response to domestic violence' Conference* Brisbane 23 -26 March 1994; P Easta *Submission* 55.

Australian Law Reform Commission Report No 67 (Interim) *Equality before the law: women's access to the legal system* ALRC Sydney 1994 (ALRC 67), para 4.35.

Australian Law Reform Commission Discussion Paper 54 *Equality before the law* ALRC Sydney 1993 (ALRC DP 54) para 11.26-11.30.

After 1 September 1994 the distinction between visas and entry permits is to be removed. Applicants will be required to obtain an 'entry visa'. The pre-screening function will remain as applicants will have to pass through 'immigration clearance' at the point of arrival before their visas will entitle them to stay in Australia.

Migration (1993) Regulations Sch 2 Class 100.

Migration (1993) Regulations Sch 2 Class 300.

This was increased in December 1992 from three months.

Residence can also be obtained by those who form an interdependent relationship with persons of the same sex. Similar requirements, including those concerning the duration of the relationship, apply to interdependent relationships.

Migration (1993) Regulations Sch 2 Class 820. When the woman applies for permanent residence she actually applies for three separate entry permits: a Processing Entry Permit (PEP) which will cover the period while her application for her Extended Eligibility Spouse Entry Permit (EESEP) is being processed (this may take some months), and finally her permanent entry permit which will apply after the two year period has elapsed (a Spouse After Entry Permit - SAEP).

There are also concessions where the spouse has died or where there are child maintenance or custody obligations on the part of the Australian nominating spouse. See para 10.16.

Procedural Advice Manual - II. Although the guidelines are contained in the section dealing with de facto marriage relationships, the section on marriage states that the guidelines are to be applied where the parties are legally married.

Migration (1993) Regulations reg 1.20.

Assurances cover only specific social security benefits (Newstart allowance, Jobsearch allowance and Special Benefits) which the migrant may claim during the first two years in Australia: *Migration (1993) Regulations* Pt 5.

The maximum amount of a bond is \$3500: *Migration (1993) Regulations* reg 5.10.

Migration (1993) Regulations Sch 2, cl 100.336, 330.334.

Department of Immigration and Ethnic Affairs unpublished statistics record a total of 16 813 spouses and fiances in 1992-93. 11 225 of these (that is, nearly 67%) were women. 17 148 spouses and fiances were sponsored to Australia in 1989-90 compared with 11 125 in 1982-83. See R Iredale, J Innes & S Castles *Serial Sponsorship: Immigration Policy and Human Rights* Centre for Multicultural Studies, University of Wollongong 1992, (*Iredale Report*).

Between 1988-89 and 1990-91, 60% of spouses and fiances were women and 74% of the total (men and women) were spouses rather than fiances. See *Iredale Report* ch 2. In 1991-92, there were 5592 male spouses/fiances, and 10 677 female spouses/fiances, ie 66% of the total were women. In 1992-93, there were 5588 men and 11 225 women in these categories, ie 67% were women: Bureau of Immigration and population Research Unpublished statistics.

Between 1988-89 and 1990-91 the ratio of women to men from Thailand was 5.21:1; from the Philippines 4.80:1, that is, approximately five times as many women as men were in these categories. The next highest ratios were Singapore, Malaysia, Sri Lanka, Vietnam, Indonesia, South Korea, Fiji and India. This contrasts with numbers from English speaking countries such as the USA, the UK and Canada, where the numbers of men and women are approximately equal: *Iredale Report*, Table 2.2, 20.

Iredale Report ch 2; A Smith & G Kaminskas 'Female Filipino Migration to Australia: An Overview' *Paper* Fourth International Philippine Studies Conference *Conference* Canberra, 1-3 July 1992.

Of a total of 52,170 spouses and fiances for 1988-89 to 90-91, the main sources were: UK 7601, Philippines 6365; Vietnam 6137; Lebanon 3103; USA 2311; Yugoslavia 2123: *Iredale Report*, Table 2.2, 20.

id, 25.

See also N O'Brien 'From Russia with love - for new country, husband' *The Australian* Monday 17 January 1994, 5, concerning the rise in the number of women emigrating from Russia (65% increase from 1991-92 to 1992-93) and the setting up of an introduction agency in WA.

eg Ethnic Affairs Commission of NSW *Serial Sponsorship: Perspectives for Policy Options* EAC Sydney 1992; S Marchi 'Immigration women and the silence of international and domestic laws' *Paper* Bureau of Immigration Research, Women in Migration *Conference* University of Melbourne, 7-8 February 1992.

Iredale Report, vii. It was reported that 80 of the 110 repeat sponsors identified 'were "known" to have subjected at least one of their spouses to domestic violence, though court orders or criminal convictions had rarely been obtained'.

Women of Far North Queensland *Submission 117*; ALRC *Consultation* Association of Non-English Speaking Background Women of Australia (ANESBWA), Sydney 9 April 1994. A community worker in the Illawarra region of NSW stated that there was an average of fifteen cases a month of domestic violence against Filipinas in the region: Illawarra Legal Centre *Submission 284*.

ALRC *Consultation* ANESBWA, Sydney 9 April 1994.

Iredale Report, ch 2 and 3; D Port *Submission 446*; ALRC *Consultation* ANESBWA Sydney 9 April 1994.

Iredale Report, 16; Filipino Women's Working Party, Ethnic Affairs Commission of NSW *Filipino Women: Challenges and Responses (1989-1991)* EAC Sydney 1992, 9-10.

124 people or organisations, including 75 community workers, were interviewed for the *Iredale Report*. Community workers 'were considered most likely to have come across the problems associated with serial sponsorship'. In commenting on the need to build rapport and trust with women, the Report noted that a 'much more comprehensive and extended research project would be required to interview significant numbers of spouses . . . or serial sponsors': *Iredale Report*, 15-16. Only three people interviewed were spouses or ex-spouses of serial sponsors.

Women of Far North Queensland *Submission 117*; Community Legal and Advocacy Centre, Fremantle *Submission 6*; A Lucadou-Wells *Submission 344*; S Marchi *Submission 609*; ; Australian Law Reform Commission Report No 57 *Multiculturalism and the law* ALRC Sydney 1992 (ALRC 57) para 4.50.

For example, Filipinas place a high value on preserving the marriage for religious and cultural reasons. Divorce is illegal in the Philippines and shame attaches to marriage breakdown. This may explain why the rate of marriage breakdown for Filipinas has been identified in some studies as no higher than for marriages in Australia as a whole. See RT Jackson & E Revilla Flores *No Filipinos in Manila: A Study of Filipino Migrants in Australia* James Cook University of Northern Queensland Townsville 1989; F Chuah et al 'Does Australia Have a Filipina Brides Problem?' (1987) 22 *Australian Journal of Social Issues* 573. For more general discussion of the problems faced by migrant women in reporting domestic violence see K M Hazlehurst *Migration, Ethnicity and Crime in Australian Society* Australian Institute of Criminology Canberra 1987; C Bertram, for Blacktown Migrant Resources Centre Inc *NESB Domestic Violence Awareness Campaign* Blacktown Migrant Resource Centre Inc Blacktown 1992.

The vulnerable position of a foreign woman married to a national of the host country has been recognised in UN studies and reports, eg Division for Advancement of Women *Migrant Women as a Vulnerable Group* UNOV 1990, 40 - cited in E Evatt 'Serial Sponsorship and Abuse of Filipino Women in Australia' in Ethnic Affairs Commission of NSW *Serial Sponsorship: Perspectives for Policy Options* EAC Sydney 1992, 10.

For example, studies of inter-cultural marriages have shown that many Filipinas are more highly educated than their Australian partners. C Boer, Research Project for the Anglican General Synod Social Responsibilities Commission and the International Affairs Commission 'Are you looking for a Filipino wife?' *A Study of Filipina-Australian Marriages* General Synod Office St Andrew's House Sydney 1988; D Cahill *Intermarriages in International Contexts: A Study of Filipina Women Married to Australian, Japanese and Swiss Men* Scalabrini Migration Centre Quezon City 1990; Department of Immigration and Ethnic Affairs Cth *A Bride for all Reasons: Report on a Pilot Survey of Filipino Brides* DIEA Melbourne 1982.

A Lucadou-Wells *Submission 344*; Women of Far North Queensland *Submission 117*; D Port *Submission 446*. See also *Iredale Report*, 31.

Illawarra Legal Centre *Submission 284*.

A Lucadou-Wells *Submission 344*.

Immigration Advice and Rights Centre, Sydney *Submission 555*.

Women of Far North Queensland *Submission 117*; A Lucadou-Wells *Submission 344*.

Women of Far North Queensland *Submission 117*.

ibid.

Illawarra Legal Centre *Submission 284*.

ICCPR art 23(2); UDHR art 16(1).

Declaration on the Elimination of Violence Against Women art 3 recognises women's entitlement to the equal enjoyment of all rights and freedoms, including the right to liberty and security of person and the right to the highest standard attainable of physical and mental health. See Australian Law Reform Commission Report No 67 *Equality before the law: women's access to the legal system* ALRC Sydney 1994 (ALRC 67), ch 3 & App 1.

E Evatt 'Serial Sponsorship and Abuse of Filipino Women in Australia' in Ethnic Affairs Commission of NSW *Serial Sponsorship: Perspectives for Policy Options* EAC Sydney 1992, 12.

CEDAW Art 6. The 1926 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the 1956 Supplementary Convention also call upon parties to punish those who procure or exploit the prostitution of another, and requires parties to make regulations to protect immigrants and emigrants, particularly women and children, to prevent trafficking for the purpose of prostitution. (Australia is not a party to this earlier convention, but the matter is covered by CEDAW as noted.)

Declaration on the Elimination of Violence Against Women art 2.

Declaration on the Elimination of Violence Against Women art 4.

Other grounds are that the spouse has died, and but for the death the relationship would have been continuing, and the applicant has established close ties with Australia; or that the applicant has custody or joint custody of the child or children of the relationship and an order for joint custody or access to the spouse has been made, or the spouse is subject to a formal maintenance obligation (this includes a child support agreement registered with the Child Support Agency).

Including ex parte and interim orders. The Department of Immigration & Ethnic Affairs advised the Commission that a they accept interim orders for the purpose of the provisions, although some doubt about interim orders may have been raised by a 1993 Federal Court case: *Samuel Claro v Minister for Immigration, Local Government and Ethnic Affairs* (unreported) Federal Court of Australia 23 April 1993, No NG551 of 1992, Fed No 880.

Domestic Violence Monitoring Committee, Department of Immigration and Ethnic Affairs *Review of the Operation and Effect of the Domestic Violence Provisions for Spouses Applying for Permanent Residence* DVMC 1993. Of those 43 claims, 21 had been approved, 3 had been refused on the grounds of the relationship not being genuine and continuing relationship, subsequent reconciliation occurred in 3 cases, and 16 were still being processed. The Department advised during consultations that at 15 March 1994 54 cases had been approved, 10 had been rejected and 5 were on hand.

eg *Iredale Report*, 41-42; C Bertram for Blacktown Migrant Resource Centre Inc *NESB Domestic Violence Awareness Campaign* Blacktown Migrant Resource Centre Inc Blacktown 1992; R Bohler 'Domestic violence policies and women from a non-English speaking background' *Paper National Multicultural Health for Australia Conference* University of Sydney 10-12 November 1993.

Immigration Advice and Rights Centre, Sydney *Submission 555*.

Applicants are not eligible for social security or Medicare benefits until they are granted permanent residence. However, they may be entitled to special benefit where their temporary entry permit is still current, or where prima facie eligibility for a permit is established. ALRC *Consultation* Department of Social Security April 1994.

A Lucadou-Wells *Submission 344*.

Project for Legal Action Against Sexual Assault *Submission 287*.

Domestic Violence Advocacy Service, Sydney *Submission 148*.

Immigration Advice and Rights Centre, Sydney *Submission 555*.

ibid.

The Department of Immigration and Ethnic Affairs advised that training of those officers was provided by the Domestic Violence Advocacy Service (NSW) and the Domestic Violence Information and Referral Centre (Vic) in 1992. However, the officers are intended to act as an information point only, rather than to offer counselling or other help. Participants in a workshop at the 'Challenging the legal system's

response to domestic violence' *Conference* Brisbane 23-26 March 1994, commented that the effectiveness of the position varies greatly from State to State.

See ch 7.

Domestic Violence Monitoring Committee *Review of the Operation and Effect of the Domestic Violence Provisions for Spouses Applying for Permanent Residence* DVMC Department of Immigration and Ethnic Affairs Canberra 1993, rec A.

Immigration Advice and Rights Centre, Sydney *Submission* 555; Illawarra Legal Centre *Submission* 284.

Domestic Violence Monitoring Committee *Review of the Operation and Effect of the Domestic Violence Provisions for Spouses Applying for Permanent Residence* DVMC Department of Immigration and Ethnic Affairs Canberra 1993, para 9.3.

The High Court has held that custody or access will not be granted to a parent if it would expose the child to an 'unacceptable risk' of sexual abuse: *M and M* (1988) 166 CLR 69, 78.

See para 10.3.

Illawarra Legal Centre *Submission* 284.

Iredale Report, 37.

Illawarra Legal Centre *Submission* 284. A similar case study was presented to the Commission by the Domestic Violence Advocacy Service, Sydney *Submission* 148.

The Department of Immigration and Ethnic Affairs were aware of one case where a man refused to provide a nomination for his wife in order for a residence application to be made ALRC *Consultation* 1 March 1994.

eg Immigration Advice and Rights Centre, Sydney *Submission* 555; Illawarra Legal Centre *Submission* 284.

See para 10.39.

eg information relating to the cost of living in Australia: A Lucadou-Wells *Submission* 344.

See Ethnic Affairs Commission NSW *Serial Sponsorship: Perspectives for Policy Options* EAC Sydney 1992; *Iredale Report*; Department for Community Welfare, Working Party Report *Filipina-Australian Marriages and Domestic Violence* Department for Community Welfare SA 1988.

National Committee on Violence Against Women *National Strategy on Violence Against Women* Office of the Status of Women, Department of the Prime Minister and Cabinet Canberra 1992, 13, Direction for Action 1.7.

This definition was adopted in ALRC DP54 and in some submissions, eg Immigration Advice and Rights Centre, Sydney *Submission* 555.

E Evatt 'Serial sponsorship and abuse of Filipino women in Australia' in Ethnic Affairs Commission NSW *Serial Sponsorship: Perspectives for Policy Options* EAC Sydney 1992, 9: 'serial sponsorship is the term coined to describe a process whereby an Australian man sponsors a woman from another country to enter Australia as a spouse, de facto or fiancé, lives with her for a time and then ends the relationship, only to repeat the process once more with another, or a series of women . . . The ending of the relationship can cause serious harm to the woman.' This broader definition has been preferred in some subsequent discussions, eg in 'Immigration and domestic violence related issues affecting women from a non-English speaking background' *Workshop* 'Challenging the legal system's response to domestic violence' *Conference* Brisbane 23-26 March 1993; S Marchi *Submission* 609.

Iredale Report, 29.

See para 9.16.

A Lucadou-Wells *Submission* 344.

ALRC *Consultation* 1 March 1994. See also *Iredale Report*, 47-48.

Several groups have recommended limits to the sponsorship of spouses and fiancés. Participants at a workshop on 'The Privacy Act and its implications for sponsorship' at the Serial Sponsorship Seminar June 1992 organised by the Ethnic Affairs Commission of NSW recommended that sponsorships be limited to two unless exceptional circumstances apply: Ethnic Affairs Commission NSW *Serial Sponsorship: Perspectives for Policy Options* EAC Sydney 1992, 49-50, rec 8.

The National Committee on Violence Against Women (NCVAW) response to the *Iredale Report* recommended that the Department should refuse sponsorship if the person is a serial sponsor or has any order/conviction for violence against any woman. The NCVAW recommendations were adopted by the workshop 'Immigration and domestic violence related issues affecting women from a non-English speaking background' *Workshop* 'Challenging the legal system's response to domestic violence' *Conference* Brisbane 23-26 March 1994.

ICCPR art 17.

Form 40. The Privacy Commissioner has expressed some concerns about the form, particularly in regard to the request for the names of previously sponsored parties. ALRC *Consultation* Privacy Commissioner, April 1994.

ALRC *Consultation* Department of Immigration & Ethnic Affairs 1 March 1994. *Migration Act* 1958 (Cth) s 167 provides a penalty 6 months imprisonment for the offence of 'obstruct, hinder, deceive or mislead'. By comparison the penalty where the applicant for entry has supplied false or misleading information imprisonment for 2 years: *Migration Act* 1958 (Cth) s 77.

One example of a person who was known to be a serial sponsor was given by the Department of Immigration and Ethnic Affairs. He had effectively been denied the right to sponsor another partner by the Department's determination that the new relationship was not genuine and continuing. ALRC *Consultation* 4 March 1994.

Privacy Act 1988 (Cth) S 14 IPP 1 also provides that personal information may only be collected for a 'lawful purpose' directly related to the agency's function or activity. Collecting information about serial sponsorships would not seem to cause any problem with meeting this requirement, particularly if the Act or regulations were amended to deal specifically with the issue.

ALRC *Consultation* Department of Immigration and Ethnic Affairs, 4 March 1994.

Iredale Report, rec 1.

ALRC *Consultation* 1 March 1994.

See para 10.28.

See *Iredale Report*, 67.

The ten year period is the period after which convictions are regarded as 'spent' (ie not to be disclosed or used by federal agencies) under the *Crimes Act* 1914 (Cth) Part VIIC.

ICCPR art 23(3); CEDAW art 16(1)(b).

Marriage Act 1961 (Cth) s 23 and 23B.

E Evatt 'Serial Sponsorship and Abuse of Filipino Women in Australia' in Ethnic Affairs Commission of NSW *Serial Sponsorship: Perspectives for Policy Options* EAC Sydney 1992, 13.

Another option is to seek a Public Interest Determination to permit disclosure of the information. Where an act or practice of an agency might breach an IPP, a Public Interest Determination under Part VI of the Privacy Act might be issued by the Privacy Commissioner to exempt the agency from complying. It would need to be shown that the public interest in disclosure (women's safety) outweighs to a substantial degree the public interest in adhering to the privacy principle. See E Evatt 'Serial Sponsorship and Abuse of Filipino Women in Australia' in Ethnic Affairs Commission of NSW *Serial Sponsorship: Perspectives for Policy Options* EAC Sydney 1992, 16-17.

In Manila the Department provides special individual counselling where a repeat sponsor is identified. However, this is a special practice for that office only: *Iredale Report*, 50.

Iredale Report, 77, citing a report by C King *Filipino-Australia Cross-cultural marriage: access to information and knowledge transfer to enable prospective spouses to make better informed decisions* (unpublished paper) University of Northern Rivers Lismore 1992. which argues that 'the information and counselling services come at a point in time far too late in the decision-making process'. DIEA agreed with this view and stated that because of this their previously extensive 'pre-embarkation kits' had been cut down to minimum size. The *Iredale Report* also noted that in addition to counselling by government and non-government bodies in the Philippines, women's groups have attempted to disseminate information on cases of murder, domestic violence etc in Australia to warn women about unscrupulous sponsors, but that 'the effect of such warnings appears, however, to have been minimal': *Iredale Report*, 77.

Departmental officers are briefed on issues surrounding serial sponsorship prior to their posting to Manila. The *Iredale Report* recommended, 'The issue of serial sponsorship should be built into initial training for DILGEA officers who are based overseas in source countries as well as into ongoing staff development programs in interviewing techniques for relevant officers. The training should cover the nature and scale of serial sponsorship, information on the nature and various forms of domestic violence and relevant legislation, and the procedures in place for addressing the problem of abuse.': *Iredale Report*, rec 3. The National Committee on Violence Against Women response to the *Iredale Report* recommended additional measures, that the Dept should refuse sponsorship if the person is a serial sponsor or has any order/conviction for violence against any woman; there should be mandatory interviewing of ALL sponsors and applicants; and mandatory counselling of the applicant where there has been a previous sponsorship.

Iredale Report, rec 6.

Iredale Report, rec 5. An alternative proposal by the National Committee on Violence Against Women in its response to that report recommended that Assurances of Support be required from repeat sponsors.

ibid.

Immigration Advice and Rights Centre, Sydney *Submission* 555.

See para 10.31.

An information leaflet on domestic violence is also available in fifteen community languages: Department of Immigration and Ethnic Affairs *Submission* 585.

The approval rate of off-shore principal applicants 1988-89 female 1153, male 3046; 1989-90 female, male 3024; 1990-91 female 968, male 2405; 1991-92 female 859, male 2452; 1992-93 female 1719 male 2968.

The approval rates of on-shore principal applicants for the last three years are 1990-91 21.8% male 10.1% female; 1991-92 5.3% male 4.1% female; 1992-93 5.1% male 4.1% female. Although overall approval rates for females exceeded that of males in 1993-94 the numbers continue to favour men by a large margin (183 females, 524 males, 1 unknown gender): Department of Immigration and Ethnic Affairs *On-Shore Refugee Program Annual Summary 1992-3* DIEA 1993.

Women's Budget Statement 1993-4 Department of Immigration and Ethnic Affairs Canberra 1993, 161.

Discussed in detail in AB Johnsson 'The International Protection of Women Refugees: A Summary of Principle Problems and Issues' (1989) 1/2 *International Journal of Refugee Law* 221.

See para 11.8. See also Report of 36th Session UNHCR E/6mm Un Doc A/Ac 96/673 para 115(4).

Office of the United Nations High Commissioner for Refugees *Guidelines on the Protection of Refugee Women* Geneva July 1991, 15.

For examples of such gender-persecution see Amnesty International Report *Women in the Front Line* AI Publications London 1991. See also UNHCR Executive Committee 42nd session Sub-committee of the Whole on International Protection *Information Note on UNHCR's Guidelines on the protection of refugee women EC/SCP/67* 22 July 1991, pt 55ff; M Meyer *Guidelines for the Asylum Claims of Women* Dutch Refugee Council Amsterdam 1986.

AB Johnsson 'The International Protection of Women Refugees - A summary of Principal Problems and Issues' (1989) 1/2 *International Journal of Refugee Law* 221, 224.

Executive of the High Commissioner's program 22nd session Sub-committee of the Whole on International Protection *Information Note on Certain Aspects of Sexual Violence Against Refugee Women EC/1993/SCP/CRP 2* 29 April 1993.

D Neal 'Women as a social group: Recognising sex-based persecution as a ground for asylum' (1988) 20 *Columbia Human Rights Law Review* 203, 203. R Haines 'Oppression of Iranian Women and Refugee Status', unpublished. The author is a member of the New Zealand Refugee Status Review Board.

See for example the World Health Assembly Resolution E3046 signed by the Australian Government calling for international collaboration to eliminate harmful traditional practices affecting the health of women and children, June 1993.

Office of the United Nations High Commissioner for Refugees *Guidelines on the Protection of Refugee Women* Geneva July 1991, 15.

Executive Committee of the High Commissioner's program 22nd session Sub-committee of the Whole on International Protection *Information Note on Certain Aspects of Sexual Violence Against Refugee Women EC/1993/SCP/CRP 2* 29 April 1993, 7.

The Executive Committee is composed of representatives from states, including Australia. Its conclusions are generally endorsed by the UN General Assembly.

United Nations High Commissioner for Refugees *Report on Refugee Women* AIAC 96/754 1989; Executive Committee of the High Commissioner's program 22nd session Sub-committee of the Whole on International Protection *Information Note on Certain Aspects*.

Office of the United Nations High Commissioner for Refugees *Guidelines on the Protection of Refugee Women* Geneva July 1991; UNHCR Executive Committee 42nd session Sub-committee of the Whole on International Protection *Information Note on UNHCR's Guidelines on the protection of refugee women EC/SCP/67* 22 July 1991.

It supported 'the recognition of refugees of persons whose claim to refugee status is based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion,' and recommended 'the development by states of appropriate guidelines on women asylum seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men'.

Immigration and Refugee Board *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines* Ottawa Canada March 1993. In the USA the most recent are by N Kelly *Guidelines for Women's Asylum Claims* Women's Refugee Project, Harvard Immigration and Refugee Program and Somerville Legal Services Cambridge MA 1993. These are not official guidelines. The 9th Circuit Report on Gender Bias recommended drafting guidelines similar to those in Canada. In the Netherlands negotiations with the Ministry of Justice over guidelines have not succeeded so far.

cited in M Hodgkinson *Submission* 356.

AC Helton 'The Use of Comparative Law and Practice Under the International Refugee Treaties' in G Coll & J Bhabha *Asylum Law and Practice in Europe and North America: a comparative analysis* Federal Publications Washington DC 1992, 9, 13.

The most significant obligation imposed on parties to the Refugee Convention is contained in Art 33. This prohibits the return or *refoulement* of a refugee to a country where she or he faces persecution.

See *Migration Regulations* (1993) Part 2A and Sch 2, cl 810.

Migration Act 1958 (Cth) s 115.

DP 54 paras 11.28-11.30.

Legal Aid Commission of NSW *Submission* 588; Amnesty International Australia *Submission* 608; M Hodgkinson *Submission* 356; Australian National Consultative Committee on Refugee Women *Submission* 49.

Satisfying the definition is less important for off-shore than on-shore applicants because off-shore applicants are also being considered under the humanitarian criteria: see para XR.

Amnesty International Australia *Submission* 608.

JC Hathaway *The Law of Refugee Status* Butterworths Canada 1991, 104-5.

CL Avery 'Refugee Status Decision-Making: The Systems of Ten Countries' (1983) 19 *Stanford Journal of International Law* 235, 244-356; TN Cox 'Well-Founded Fear of Being Persecuted': The Sources and Application of a Criterion of Refugee Status' (1984) 10 *Brooklyn Journal of International Law* 333, 353-78; Howland, 'A Comparative Analysis of The Changing Definition of a Refugee' (1987) 5 *Journal of Human Rights* 33, 42-69.

JC Hathaway *The Law of Refugee Status* Butterworths Canada 1991, chapter 5; J Vernant *The Refugee in the Post-War World* Allen and Unwin London 1953, 5; on the Australian Position see P Hyndman 'The 1951 Convention on the definition of refugee: an appraisal with particular reference to the Sri Lankan Tamil applicants' (1987) 9 *Human Rights Quarterly* 49.

D Indra 'Gender: A Key Dimension of the Refugee Experience' (1987) 6 *Refugee* 1.

US 9th Circuit Gender Bias Taskforce *The Effects of Gender in the Federal Courts Final Report* Gender Bias Taskforce US 1993, 119.

Legal Aid Commission of NSW, *Submission* 588.

Chan Lee Kin v The Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379.

id 388.

Reproduced in *Australian Immigration Law* Butterworths Sydney para 8010.4.

'Developments' (1993) 1/5 *International Journal of Refugee Law* 111.

Executive Committee of the High Commissioner's program 22nd session Sub-committee of the Whole on International Protection *Information Note on Certain Aspects of Sexual Violence Against Refugee Women* EC/1993/SCP/CRP.2 29 April 1993, 13.

See Executive Committee Conclusion No 64(XLI), fourth preambular paragraph, and General Assembly resolution 45/140 (1990), para 6.

eg in *Gomez v INS* 974 F.2d 660 (2d Cir 1991), Circuit 1987 the applicant sought asylum, stating she was raped and beaten by guerillas on at least five occasions between the ages of twelve and fourteen. She fled to the United States at the age of eighteen and claimed asylum as she was persecuted on the basis of her membership of the social group of young women previously raped by the guerrillas. Asylum was denied because she did not demonstrate that the guerillas would seek to harm her based on her association with a particular social group or any other Convention reason.

Campos-Guardado v Immigration and Nationalisation Service 809 F.2d 285 (5th Cir 1987) is a case in point. There, the Salvadorean applicant was visiting an uncle when the house was attacked by a group of guerilla fighters. She and her relatives were taken to a pit. The males in the group were tortured and then shot in front of the women. The applicant and her companions were then raped. An immigration judge and the American Board of Immigration Appeals both denied asylum to the woman on the ground that the rape was not motivated by her political opinions or actions. The case is discussed in M Mulligan 'Obtaining Political Asylum: Classifying Rape as a Well-founded Fear of Persecution on Account of Political Opinion' (1990) *Boston College Third World Law Journal* 355, 355-7. Compare *Lazo-Majano* 813 F.2d 1432 (9th Circuit 1987). The applicant was repeatedly sexually assaulted, harassed and humiliated by her employer (an officer in the Salvadorean armed forces) who warned her that if she told the authorities about his assaults, he would have her tortured and killed as a subversive. The Ninth Circuit court held that the officer had imputed political opinions to the applicant, and that the officer believed that he could dominate and suppress women. The applicant's resistance and flight from this belief expressed a political opinion that she should be free of abuse. The American cases are discussed by M Hodgkinson *Submission* 356, 6-7.

Legal Aid Commission NSW *Submission* 588.

Case study cited in Legal Aid Commission of NSW *Submission* 588.

In one case a Sikh woman's rape was regarded as one incident in a number involving torture and mistreatment of both herself and her husband. RRT N93/01299 dated 1/3/94.

RRT Case No BN93/02205 dated 22/3/94.

See eg RRT decision no 93/01974 dated 22/2/94; N93/01368 dated 8/2/84 and BV 93/00055 dated 4/2/94.

See RRT Case No N/93/00064 dated 10/1/94.

RRT Case No V94/01484 dated 2/5/94.

See JC Hathaway *The Law of Refugee Status* Butterworths Canada 1991, 105; S Young 'Who is a refugee? a theory of persecution' (1982) 5 *Defense of the Alien* 38; G Goodwin-Gill 'Entry and exclusion of refugees: the obligations of states and the protection function of the Office of the UNHCR' (1980) *Michigan Yearbook of International Legal Studies* 291, 298-9.

See for example RRT Cases No 93/00446 dated 25/3/94 and RRT Case No 95/01945 dated 12/4/94.

Discussion with Social Justice Co-ordination Unit Department of Immigration and Ethnic Affairs May 1994.

United States Department of State Country Reports on Human Rights Practices 1989 quoted in Legal Aid Commission of NSW *Submission* 588.

RRT Case No N93/00556 dated 14/4/94. It is a measure of the Minister's concern with this decision that it has been taken on review to the Federal Court.

RRT Case No BV93/00863 dated 18/2/94.

RRT Case No N93/01353 dated 19/1/94.

Chan Lee Kin v The Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 see Mason CJ at 389, 398, 407, 429 and Dawson J at 296.

See para 5.4.

US Department of State Country Reports on Human Rights Practices 1993 quoted in Legal Aid Commission of NSW *Submission* 588.

This was recommended in a submission M Hodgkinson *Submission* 356.

See Canadian Guidelines, Appendix 2,8

Even the most conservative view of human rights admits freedom from cruel, or inhuman treatment as part of the 'core' of human rights protected under the Refugee Convention. J Hathaway *The Law of Refugee Status* Butterworths Canada 1991, 105-112.

Rape and other forms of sexual abuse not only violate the prohibitions of violence against the person, cruel treatment and torture, and degrading treatment contained in the four Geneva Conventions of 1949, international humanitarian law also explicitly prohibits rape. Article 27 of the Fourth Geneva Convention of 1949 states 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.' This provision is reiterated in Additional Protocol I and II.

UNHCR Executive Committee 22nd session Sub-committee of the Whole on International Protection *Information Note on Certain Aspects of Sexual Violence* EC/1993/SCP/CRP.2 April 1993.

N Kelly *Guidelines for Women Asylum Claims* Women Refugees Project Harvard Immigration and Refugee Program and Sommerville Legal Services Cambridge MA 1993. See also RRT Case No 93/00175 dated 11 January 1994.

RRT Case No V94/01484 dated 2/5/94.

N Kelly *Guidelines for Women Asylum Claims* Women Refugees Project Harvard Immigration and Refugee Program and Sommerville Legal Services Cambridge MA 1993.

See Appendix 2.

N Kelly *Guidelines for Women Asylum Claims* Women Refugee Project Harvard Immigration and Refugee Program and Somerville Legal Services Cambridge MA 1993.

Executive Committee of UNHCR 36th session No 39, *Refugee Women and International Protection*

M Meyer *Guidelines for the Asylum Claims of Women* Dutch Refugee Council Amsterdam 1986.

Question 74 of Form 830.

Legal Aid Commission of NSW *Submission 588*.

Immigration and Refugee Board *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines* Ottawa Canada March 1993.

RRT Case No BV93/00175 dated 22/3/94.

Legal Aid Commission of NSW *Submission 588*.

For instance the communal kitchens and missing person campaigns set up by Chilean women in protest at the Pinochet regimes reported in Canadian case law. See J Greatbach 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1 *International Journal of Refugee Law* 518.

In *Modjan Shahabaldin* Immigration Appeal Board Decision V85-6161 2 March 1987 the Canadian Board held the unwillingness of an Iranian woman to wear the chador and attend Islamic functions as political opinion.

Immigration and Refugee Board *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines* Ottawa Canada March 1991.

(1992) 39 FCR 401.

id 666.

(1993) 117 ALR 455.

RRT Case No BN 9300446 dated 25/3/94.

See D Neal 'Women as a social group: recognising sex-based persecution as a grounds for asylum' (1988) 20 *Columbia Human Rights Law Review* 203, fn 29, 234.

RRT Case No BN93/02205 dated 22/3/94.

id 4.

See AB Johnsson 'The International Protection of Women Refugees: A Summary of Principal Problems and Issues' (1989) 1/2 *International Journal of Refugee Law* 221 fn 29; D Indra 'Gender: A Key Dimension of the Refugee Experience' (1987) 6 *Refuge* 1 fn 31; J Greatbach 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1/4 *International Journal of Refugee Law* 518 fn 32; M. Hodgkinson *Submission 356* fn 24.

D Neal 'Women as a social group: recognising sex-based persecution as a ground for asylum' (1988) 20 *Columbia Human Rights Law Review* 203, 228.

JC Hathaway *The Law of Refugee Status* Butterworths Canada 1991, 162.

K Bower 'Recognising Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group' (1993) 7 *Georgetown Immigration Law Journal* 173, 175 fn 6; MI Pratt 'The Notion of Membership of a Particular Social Group: A European Perspective' in G Coll & J Bhabha *Asylum Law and Practice in Europe and North America: a comparative analysis* Federal Publications Washington DC 1992, 71, 79.

Immigration and Refugee Board *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines* Ottawa Canada March 1991.

UNHCR Executive Committee 42nd session Sub-committee of the Whole on International Protection *Information Note on UNHCR's Guidelines on the protection of refugee women* EC/SCP/67 22 July 1991.

JR Castel 'Rape, Sexual Assault and the Meaning of Persecution' (1989) 1/4 *International Journal of Refugee Law* 518, 533 fn; 8 K Bower 'Recognising Violence Against Women as Persecution on the Basis of Membership of A Particular Social Group' (1993) 7 *Georgetown Immigration Law Journal* 173, 204 fn 6; J Greatbach 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1/4 *International Journal of Refugee Law* 518 fn11; JC Hathaway *The Law of Refugee Status* Butterworths Canada 1991, 163 fn 14 '. While some have expressed reservations about the broad ambit of gender-defined social groups, adherence to the *ejusdem generis* principle defeats such concerns, since race, nationality, religion, and even political opinion are also traits which are shared by large numbers of people.

eg *Astudillo v Minister of Employment and Immigration* (1979) 31 NR 121 (FCA).

Sanchez Trujillo v Immigration and Naturalisation Service, 801 F 2d 1571 (9th Cir 1986), 1576.

The US Court of Appeal. [6307 as marked].

J Greatbach 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1/4 *International Journal of Refugee Law* 518, 525.

ibid.

Conclusion No 39 (XXXVI) *Refugee Women and International Protection* (1985).

CP Blum 'Refugee Status Based on Membership in a Particular Social Group: A North American Perspective' in *Asylum Law and Practice in Europe and North America: a comparative analysis* Federal Publications Washington DC 1992, 81 85-99.

Invention Refugee Determination Decisions, Immigration and Refugee Board of Canada (Convention Refugee Determination Division) Toronto, Ontario 17/7/90.

Immigration and Refugee Board *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines* Ottawa Canada March 1993.

Migration Act 1958 (Cth) s 179.

The DIEA has informed the Commission that under the Migration Reform Act application forms will make it clearer that each individual can make a separate claim or one as a family unit.

Legal Aid Commission of NSW *Submission 588*.

ibid.

For an example of this occurring see RRT Case No BN93/02205 dated 22/3/94, 12-13. Note that the decision-maker in that case ultimately accepted the applicant's evidence.

9th Circuit, Gender Bias Task Force Final Report (1993) Part III, 119.

Immigration and Refugee Board *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines* Ottawa Canada March 1991.

eg The Office of the United Nations High Commissioner for Refugees *Guidelines on the Protection of Refugee Women* Geneva July 1991, 41.

Executive Committee of the High Commissioner's program 22nd session Sub-committee of the Whole on International Protection *Information Note on Certain Aspects of Sexual Violence Against Refugee Women* EC/1993/SCP/CRP 2 29 April 1993.

See *Migration Act* (1958) Part 2 Div 4B. The laws are discussed in M Crock 'Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia' (1993) 15 *Sydney Law Review* 338.

A Biro 'A Welfare Worker's Experience' in M Crock (ed) *Protection or Punishment: The Detention of Asylum Seekers in Australia* Federation Press Sydney 1993, 97-98.

Joint Standing Committee on Migration Regulation *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control* Australian Government Publishing Service Canberra 1992.

Joint Standing Committee on Migration Regulation *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control* Australian Government Publishing Service Canberra 1992, 80-104.

Special assistance is given currently to East Timorese from Portugal, people from the former Yugoslavia, Jewish people from the former Soviet Union, Sudanese Christians, Burmese living in Burma and Thailand and Cambodians living in Cambodia.

With the exception of the 'woman at risk' category which is considered below in para 11.6.

Legal Aid Commission of NSW *Submission 588*; Australian National Consultative Committee on Refugee Women *Submission 49*.

See *Migration (1993) Regulations* Part 2 A and Sch 2, cl 200.

See Department of Immigration and Ethnic Affairs *Procedures Advice Manuals II* (PAM II).

Migration Regulations (1993) Sch 2 cl 200, 321-331.

These Manuals are produced by the Department as aids for decision-makers. They are meant to express the prevailing policies of the government in each area of decision-making. In strict legal terms, however, the PAMS do not have the force of law.

See para 11.36.

Department of Immigration and Ethnic Affairs *Procedures Advice Manuals II* (PAMII), para 8.11.

For example the emphasis is placed on requirements that applicants demonstrate a publicly recognisable political profile or publicly held opinions, attributes that are more readily attributable to males than to females in many cultures.

For example what constitutes 'membership of a particular social group'.

(1989) 169 CLR 379, 429-430.

Migration Regulations (1993) cl 200.332(d).

Department of Immigration and Ethnic Affairs *Procedures Advice Manuals* (PAM II) ch 21 para 10.3.

Legal Aid Commission of NSW *Submission 588*; M Hodgkinson *Submission 356*; Australian National Consultative Council on Refugee Women *Submission 49*; Amnesty International Australia *Submission 608*.

M Hodgkinson *Submission 356*.

Smithers J in *R v Regional Director (North East Asia)*; *Ex parte Hon Cheung Man* Unreported Federal Court 23 March 1984.

For example see *Ebrahimi v Minister for Immigration and Ethnic Affairs* (1988) 15 ALD 360. See also the transcript of Einfeld J's judgement dated 23 May 1988.

In 1984, one imaginative solicitor argued that rating people on their settlement prospects amounted to judging people on the basis of their conformity with the white Anglo-Saxon norms of Australian society. This, it was said, brought the immigration laws into conflict with the *Racial Discrimination Act 1975* (Cth). The argument met with no success. See *R v Regional Director (North East Asia)*; *Ex parte Hon Cheung Man* Unreported Federal Court Smithers J 23 March 1984.

The target intake for 1993-94 is 400 places.

Migration Regulations (1993) Sch 2 cl 204.

Migration Regulations (1993) Sch 2 cl 204, 332.

Note however that in the Department of Immigration and Ethnic Affairs *Procedures Advice Manuals* (PAM II) Ch 10 para 204.12 still refers to the Refugee Convention definition of refugee as a prerequisite for entry under the Women at Risk program.

For example reform in several States and Territories of the laws relating to examination of the victim's sexual history, the need for corroboration of her evidence, the definition of consent, and rape in marriage. See for example Victorian Law Reform Commission Report No 43 *Rape: Reform of law and procedure* VLRC 1991 and Victorian Law Reform Commission Report No 46 *Rape: Reform of law and procedure: supplementary issues* VLRC 1992; Attorney-General for the Northern Territory *Sexual abuse discussion paper* Department of Law Darwin 1992. There have also been significant amendments to laws relating to domestic violence - see chapter 9.

DP 54 question 11.12.

DP 54 question 11.13.

Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*; S Anchor *Submission 143*; P Wright *Submission 206*.

P Eastal *Killing the beloved* Australian Institute of Criminology Canberra 1993, 137; S Tarrant 'Provocation and self-defence: a feminist perspective' (1990) 15 *Legal Service Bulletin* 147, 149.

P Wright *Submission 206*.

Women's Electoral Lobby Australia Inc *Submission 281* Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*; Justice for Women Action Collective *Submission 2*; J Blokland *Submission 347*; Domestic Violence Resource Centre, Lutwyche QLD *Submission 281*; P Eastal *Submission 55*; R Rana *Submission 72*; P Wright *Submission 206*.

J Blokland *Submission 347* commenting on the NT provision.

Although statements of principle do not specify as a matter of law that the attack must be imminent, it must usually be so 'for the defence to have any prospect of success'. See P Gillis *Criminal Law* 2nd ed Law Book Company Sydney 1990, 303. See also *Viro v R* (1978) 141 CLR 88, 146; *Howe v R* (1958) 100 CLR 448, 460; *Zecevic v DPP* (1987) 162 CLR 645.

See P Eastal *Killing the beloved* Australian Institute of Criminology Canberra 1993, 138.

Studies have shown that violence often escalates during and after separation. See A Wallace *Homicide: the social reality* NSW Bureau of Crime Statistics and Research Sydney 1986.

J Blokland *Submission 347*.

Provocation reduces the crime from murder to manslaughter and may also be taken into account in imposing a more lenient sentence.

See for example *R v Duffy* (1949) 1 All ER 932; *R* (1981) 28 SASR 321 at 321-322 per King CJ. The requirement of suddenness has been specifically removed by legislation in NSW - see s 23 *Crimes Act 1900*. The law of provocation is under review by the NSW Law Reform Commission Discussion Paper 31 *Provocation, diminished responsibility and infanticide* NSWLRC 1993.

It has been stated that for a man to find his wife in the act of committing adultery will always amount to provocation at law. See P Gillies *Criminal law* 2nd ed Law Book Company Sydney 1990, 349 citing a number of cases including *Parker v R* (1963) 111 CLR 610 at 653 per Windeyer J.

J Blokland *Submission 347*; Justice For Women Action Collective *Submission 2* arguing that the use of the provocation defence should be restricted where men have murdered female partners; Women's Electoral Lobby VIC *Submission 27* which argued that the legal system is more lenient when men appear to have impulsively killed women who have ended a relationship or even refused to be in one.

P Wright *Submission 206*.

Domestic Violence Resource Centre, Woolloowin Qld *Submission 295*.

The syndrome is based on the work of American clinical psychologist Lenore Walker. See L Walker *The Battered Woman Syndrome* Springer New York 1984.

See for example *R v Runjanjic and Kontininen* (1991) 53 A Crim R 362; *R v Kontininen* (1992) 16 *Criminal Law Journal* 360; *R v Hickey* (1992) 16 *Criminal Law Journal* 271.

For example false imprisonment, grievous bodily harm, fraud and breaches of duties of directors under the Companies Code. See J Stubbs 'Battered Woman Syndrome in Australia' *Paper 'Challenging the Legal System's Response to Domestic Violence' Conference* 23-26 March Brisbane 1994.

R Alexander, F Fomin, M Fried, E Gray, C Lamble, K Robertson & S Panagiotidis *Submission 292*.

Legal Aid Office ACT *Submission 294*.

P Wright *Submission 206*; Confidential *Submission 292*; Legal Aid Office ACT *Submission 294*. See also EA Sheehy et al 'Defending battered women on trial: the battered woman syndrome and its limitations' (1992) 16 *Criminal Law Journal* 369.

P Wright *Submission 206*.

J Blokland *Submission 347* called for a defence of 'sudden and extreme emergency' which would apply if the person believed

- (a) that an urgent situation of peril exists
- (b) that committing the offence is the only way to avoid the peril and
- (c) that the conduct is a reasonable response to the peril.

There would be a need to clarify 'emergency' and 'reasonable'.

P Wright *Submission 206* argued for a new defence of self-preservation, intended to encompass the preservation of both the physical and mental self. The main elements would be that

- (i) the accused had lived with, or had frequent contact with, a person who had exerted power over her or him and subjected her or him to violence and abuse over a period of time
- (ii) his or her capacity to act to escape must have been severely limited; and
- (iii) he or she killed because of a reasonable fear for her or his life or safety, physical or mental, or of those dear to her or him, such as children. The 'reasonableness' of the fear would be judged from the viewpoint of someone who had endured the accused's experiences.

Women's Electoral Lobby Australia Inc *Submission 281*.

See for example EA Sheehy et al 'Defending Battered Women on Trial: the Battered Woman Syndrome and its Limitations' (1992) 16 *Criminal Law Journal* 369; Z Rathus *Rougher than usual handling: women and the criminal justice system* Women's Legal Service Inc Brisbane 1993 ch 2; K Budrikis 'Notes on Hickey: the problems with a psychological approach to domestic violence' (1993) 15(3) *Sydney Law Review* 365.

Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*; Domestic Violence Resource Centre, Lutwyche QLD *Submission 381*; P Easteal *Submission 55* (as an alternative to redefining defences).

S Anchor *Submission 143*.

P Wright *Submission 206*.

Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*; Domestic Violence Resource Centre, Lutwyche QLD *Submission 381*.

(unreported) Ct A Qld 29 November 1993.

The evidence included a history of sexual assaults including multiple rapes on the defendant and threats of sexual assault on her niece.

per the President and Davies JA, 35 in stating that 'there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of (i) her Aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased'.

Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*; Women's Electoral Lobby VIC *Submission 27*; Community and Legal Advocacy Centre, Fremantle *Submission 6*; P Easteal *Submission 55*.

Freedom from Violence Action Group Women's Electoral Lobby VIC *Submission 27*; Confidential *Submission 78*; Domestic Violence Resource Centre, Lutwyche QLD *Submission 381*; Whitford Women's Health Centre WA *Submission 10*; P Easteal *Submission 55*. See also P Easteal *Killing the beloved* Australian Institute of Criminology Canberra 1993, 19.

R Alexander, F Fomin, M Fried, E Gray, C Lamble, K Robertson & S Panagiotidis *Submission 292*; P Easteal *Submission 55* who also called for monitoring of the use of defences and judicial practices.

Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*; P Easteal *Submission 55* who called for the Australian Government to examine whether clemency should be granted to such women as several US State governors have done.

Domestic Violence Resource Centre, Woolloowin QLD *Submission 295*.

For example the *Declaration on the Elimination of Violence Against Women* art 4(f) which calls on all States to develop preventative approaches to promote the protection of women against any form of violence and 'to ensure that the revictimisation of women does not occur because of gender-insensitive law, enforcement practices or other interventions' - see Interim Report ch 3.

Attorney-General's Department *Review of Commonwealth criminal law: principles of criminal responsibility and other matters: Interim Report* Australian Government Publishing Service Canberra 1990; Attorney-General's Department *Review of Commonwealth criminal law: Final Report* Australian Government Publishing Service Canberra 1991 (the Gibbs Report).

Criminal Law Officers Committee of the Standing Committee of the Attorneys-General *Model Criminal Code Chapter 2: General principles of criminal responsibility Final Report* AGPS Canberra 1992. The Code defines self-defence as conduct which the person believed was necessary, among other things, to defend himself or herself and which was 'a reasonable response in the circumstances as perceived by him or her' (s 313.1). What is 'reasonable' is not discussed in the accompanying commentary.

See Z Rathus *Rougher than Usual Handling: Women and the Criminal Justice System : A gender critique of Queensland's Criminal Code and ancillary criminal legislation with particular reference to the 1992 Final Report of the Criminal Code Review Committee to the Attorney-General* The Women's Legal Service Brisbane 1993.

See Interim Report.